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BRITISH CLASSICS.

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THE
CONSTITUTION
OF
ENGLAND,

IN WHICH IT IS COMPARED BOTH
WITH THE REPUBLICAN FORM OF GOVERNMENT,
AND THE OTHER MONARCHIES IN EUROPE.

By J. L. DE LOLME.

WITH A LIFE OF THE AUTHOR.

Ponderibus librata suis. -- Ovid, Met. lib. i. v. 13.

VOL. I.



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L I F E
O F
THE AUTHOR.

OF the life of JOHN LOUIS DE LOLME, the author of the popular work, on the ‘English constitution,’ but few particulars are known; or at least, known in this country. His family had been long settled at Geneva, where he was born about the year 1745.

He tells us in his advertisement, that he was twenty-seven years old when he came to England, where he resided for several years. The writer of these pages has been informed, that he was a man of irritable temperament; soon offended and not easily pleased. This characteristic is indeed sufficiently perceptible in his advertisement. He complains of neglect and of the want of encouragement; and how few literary men are there who have not made the same complaint!

The present work was originally published in

French; and experienced a very favourable reception upon the continent. The first English edition made its appearance in 1775. It has not hitherto been explained in what manner the translation was made; whether by the author himself, or by another person.—The following information on that subject may therefore not be unacceptable. At the time that the translation was begun, M.^r De Lolme was too little acquainted with the English language, to write it with grammatical accuracy, and still less with idiomatic propriety.—But as he was unwilling that the profits of an English version of his treatise should be engrossed by any other person, he resolved to make the attempt, and, consequently translated some of the sheets into such English, as if it had been printed could hardly have been understood. His manuscript of these sheets was shewn to M.^r Baron Maseres, who had recently become acquainted with the author, and who very kindly undertook the task of correcting the grammatical and other inaccuracies of the translation; and of substituting for the numerous Gallicisms of M.^r De Lolme, a pure unaffected English phraseology.—The author for several months waited on M.^r Baron Maseres, every morning at his chambers in the Tem-

ple; and it was under his enlightened superintendence and benevolent assistance, that the present translation was fitted for the press. When the work first appeared, it was, as the writer of these few pages believes, dedicated to the then lord Abingdon, with whom the author had become acquainted during his residence at Geneva.—But M.^r De Lolme was rather capricious in his partialities, and variable in his friendships. He possessed that kind of mind which is apt to construe slight or unintentional neglects into serious and premeditated affronts. The name of lord Abingdon was not long retained. A subsequent edition exhibited another object of the writer's panegyric, till the fourth edition was given to the public with a dedication to the late king.

As the author enlarged his treatise in the subsequent editions, and as the additional matter does not appear to have been subjected to the revision or to have experienced the correction of the able scholar above mentioned, this circumstance may account for the diversities of style and incongruities of idiom which are perceptible in different parts of the work.

Of the essay itself, it is now needless to speak. It has long been exposed to the judgment of the public, and it has certainly experienced a fa-

vourable verdict. If the author's remarks are not often profound, they are usually acute; and they are never dull.—If the theory of the 'English Constitution' is often better than the practice, it is not the fault of M.^r De Lolme, nor of other writers, who have indulged in similar eulogies on the venerable fabric.

The light of modern times is at present radiating round the institutions of a less civilized age, and it is not improbable that improvements will hereafter be introduced, particularly in the representation of the people in the house of commons, which will bring the interest of the government into a more compact and solid union with that of the community.

Besides the present volume, M.^r De Lolme was the author of several other works; but none of which made any addition to his literary reputation. His 'History of the Flagellants' which was published in 1783, was not very honourable to the purity of his sentiments or the delicacy of his taste.—Of the two or three political pamphlets, which issued from his pen, little is remembered. They made only a transient impression when they were published, and are now consigned to oblivion along with the other ephemeral productions of the same period.

M.^r De Lolme's circumstances forced him to become an author by profession ; but he found this only a precarious and insufficient support. Whether it was owing to want of perseverance, to want of economy, or to adverse circumstances, which no foresight could prevent and no prudence counteract, it is certain that, for a long interval, before he left this country he suffered great pecuniary distress. The writer of this biographical sketch has been informed that his poverty, at one period, was so great as to compel him to submit to a species of menial drudgery, which must have been very humiliating to his pride.

For some time previous to his decease, M.^r De Lolme retired to France, where he obtained an official situation under the late emperor Napoleon ; and was sub-prefect in one of the departments. In this situation he died in 1807.

M.^r De Lolme had travelled a good deal before he came to this country. In France, his penetrating mind could not fail to remark that general change of opinion, both religious and political, which was the precursor of the revolution. The spirit of inquiry, which had been awakened at the reformation, had long been slowly but surely dissipating those prejudices which attached the

people to an arbitrary government.—Revolutions are first effected in the mind; and till this mental revolution is complete, all great changes in ancient establishments are premature. If they are attempted, the attempt will either prove abortive, or the change will be fleeting and evanescent. The change of opinion, which had taken place in France, was very great; but it was not so great as to warrant the adoption of an entirely new form of government. Hence the first French reformers were not wise in attempting the destruction of the monarchy: and hence the republican constitution, which they established, proved only a fugitive phantom; while it prepared the way for a despotism of a more rigid and oppressive character than that which had been overturned.

The English constitution has been so long-lived, because it has gradually accommodated itself to the change of sentiment in the national mind.—But, if the government of the country, instead of being directed by the light of the age, will set itself in direct opposition to those changes in particular parts of the constitution, which the change of opinion has rendered necessary, and which the diffusion of knowledge has rendered safe, a violent and perilous conflict must

hereafter arise between the advocates for a more enlarged and comprehensive system of policy, and the interested adherents to the corrupt part of our ancient institutions. Some writers have predicted the destruction of English liberty when the legislative body shall become the most corrupt part of the constitution. Whether the latter event is not rapidly approaching, or has not already occurred, it must be left to others to determine ;—but it is certain , at the same time, that the principles of liberty were never in any period of our history in a state of wider expansion and more vigorous growth.—And while these principles are connected with the increase of knowledge, the people of this country can never cease to be free.—The government may be actuated by despotic propensities or the legislature may be corrupt, but there will still be a strong counteracting energy in the augmented information , and enlightened virtue of the community.

ADVERTISEMENT.

THE book on the English Constitution, of which a new edition is here offered to the public, was first written in French, and published in Holland. Several persons have asked me the question, How I came to think of treating such a subject? One of the first things in this country, that engage the attention of a stranger who is in the habit of observing the objects before him, is the peculiarity of its government : I had moreover been lately a witness of the broils which had for some time prevailed in the republic in which I was born, and of the revolution by which they were terminated. Scenes of that kind, in a state which, though small, is independent, and contains within itself the principles of its motions, had naturally given me some competent insight into the first real principles of governments : owing to this circumstance, and perhaps also to some moderate share of natural abilities, I was enabled to perform the task I had undertaken with tolerable success. I was twenty-seven years old when I came to this country : after having been in it only a year, I began to write my work, which I published about nine months afterward; and have since been surprised to find that I have committed so few errors of a certain

kind : I certainly was fortunate in avoiding to enter deeply into those articles with which I was not sufficiently acquainted.

The book met with rather a favourable reception on the continent; several successive editions having been made of it : and it also met here with approbation, even from men of opposite parties; which, in this country, was no small luck for a book on systematical politics. Allowing that the arguments had some connexion and clearness, as well as novelty, I think the work was of peculiar utility, if the epoch at which it was published is considered; which was, though without any design from me, at the time when the disputes with the colonies were beginning to take a serious turn, both here and in America. A work which contained a specious, if not thoroughly true, confutation of those political notions, by the help of which a disunion of the empire was endeavoured to be promoted (which confutation was moreover noticed by men in the highest places), should have procured to the author some sort of real encouragement, at least the publication of it should not have drawn him into any inconvenient situation. When my enlarged English edition was ready for the press, had I acquainted ministers that I was preparing to boil my tea-kettle with it, for want of being able conveniently to afford the expense of printing it, I do not pretend to say what their answer would have been; but I am firmly of opinion,

that, had the like arguments in favour of the existing government of this country, against republican principles, been shewn to Charles the First, or his ministers, at a certain period of his reign, they would have very willingly defrayed the expenses of the publication. In defect of encouragement from great men (and even from booksellers), I had recourse to a subscription: and my having expected any success from such a plan, shews that my knowledge of this country was at that time very incomplete¹.

¹ In regard to two subscribers in particular, I was, I confess, sadly disappointed.—Though all the booksellers in London had at first refused to have any thing to do with my English edition (notwithstanding the French work was extremely well known), yet, soon after I had thought of the expedient of a subscription, I found that two of them, who are both living, had begun a translation, on the recommendation, as they told me, of a noble lord, whom they named, who had, till a few years before, filled one of the highest offices under the crown. I paid them ten pounds, in order to engage them to drop their undertaking, about which I understood they already had been at some expense. Had the noble lord in question favoured me with his subscription, I would have celebrated the generosity and munificence of my patron; but, as he did not think proper so to do, I shall only observe, that his recommending my work to a bookseller cost me ten pounds.

At the time the above subscription for my English

After mentioning the advantages with which my work has not been favoured, it is, however,

edition was advertising, a copy of the French work was asked of me for a noble earl, then invested with a high office in the state; none being at that time to be found at any bookseller's in London. I gave the only copy I had (the consequence was, that I was obliged to borrow one, to make my English edition from); and I added, that I hoped his lordship would honour me with his subscription. However, my hopes were here again confounded. As a gentleman, who continues to fill an important office under the crown, accidentally informed me, about a year afterward, that the noble lord here alluded to had lent him my French work, I had no doubt left that the copy I had delivered had reached his lordship's hand; I therefore presumed to remind him, by a letter, that the book in question had never been paid for; at the same time apologising for such liberty from the circumstances in which my late English edition had been published which did not allow me to lose one copy. I must do his lordship (who is moreover a knight of the garter) the justice to acknowledge, that, no later than a week afterward, he sent two half crowns for me to a bookseller in Fleet-street. A lady brought them in a coach, who took a receipt. As she was, by the bookseller's account, a fine lady, thought not a peeress, it gave me much concern that I was not present to deliver the receipt to her myself.

At the same time I mention the noble earl's great punctuality, I think I may be allowed to say a word

just, that I should give an account of those by which it has been attended. In the first place, as is above said, men of high rank have condescended to give their approbation to it; and I take this opportunity of returning them my most humble acknowledgments. In the second place, after the difficulties, by which the publication of the book had been attended and *followed*, were overcome, I began to share with booksellers in the profits arising from the sale of it. These profits I indeed thought to be but scanty and slow : but then I considered this was no more than the common complaint made by every trader in regard to his gain, as well as by every great man in regard to his emoluments and his pensions. After a course of some years, the nett balance, formed by the profits in question, amounted to a certain sum, proportioned to the size of the performance : and, in fine, I must add to the account of the many favours I have received, that I was allowed to carry on the above business of selling my book, without any objection being formed against me from my not

of my own merits. I waited, before I presumed to trouble his lordship, till I was informed that a pension of four thousand pounds was settled upon him (I could have wished much my own creditors had, about that time, shewn the like tenderness to me), and I moreover gave him time to receive the first quarter.

having served a regular apprenticeship, and without being molested by the inquisition. — Several authors have chosen to relate, in writings published after death, the personal advantages by which their performances have been followed: as for me, I have thought otherwise; and, fearing that during the latter part of my life I may be otherwise engaged, I have preferred to write now the account of my successes in this country, and to see it printed while I am yet living.

I shall add to the above narrative (whatever the reader may be pleased to think of it) a few observations of rather a more serious kind, for the sake of those persons who, judging themselves to be possessed of abilities, find they are neglected by such as have it in their power to do them occasional services, and suffer themselves to be mortified by it. To hope that men will in earnest assist in setting forth the mental qualifications of others, is an expectation which, generally speaking, must needs be disappointed. To procure one's notions and opinions to be attended to, and approved by the circle of one's acquaintance, is the universal wish of mankind. To diffuse these notions farther, to numerous parts of the public by means of the press, or by others, becomes an object of real ambition; nor is this ambition always proportioned to the real abilities of those who feel it: very far from it. When the approbation of mankind is in question,

all persons, whatever their different ranks may be, consider themselves as being engaged in the same career; they look upon themselves as being candidates for the very same kind of advantage: high and low, all are, in that respect, in a state of primæval equality; nor are those, who are likely to obtain some prize, to expect much favour from the others.

This desire of having their ideas communicated to, and approved by, the public, was very prevalent among the great men of the Roman commonwealth, and afterward with the Roman emperors; however imperfect the means of obtaining those ends might be in those days, compared with those which are used in ours. The same desire has been equally remarkable among modern European kings, not to speak of other parts of the world, and a long catalogue of royal authors may be produced. Ministers, especially after having lost their places, have shewn no less inclination than their masters, to convince mankind of the reality of their knowledge. Noble persons, of all denominations, have increased the catalogue. And, to speak of the country in which we are, there is, it seems, no good reason to make any exception in regard to it; and great men in it, or in general those who are at the head of the people, are, we find, sufficiently anxious about the success of their speeches, or of the printed performances which they sometimes condescend to lay before the

public : nor has it been every great man, wishing that a compliment may be paid to his personal knowledge, that has ventured to give such lasting specimens.

Several additions were made to this work at the time I gave the first English edition of it. Besides a more accurate division of the chapters, several new notes and paragraphs were inserted in it : for instance in the 11th chapter of the second book ; and three new chapters, the 15th, 16th , and 17th , amounting to about ninety pages, were added to the same book.—These three additional chapters, never having been written by me in French , were inserted in the third edition made at Amsterdam, translated by a person whom the Dutch bookseller employed for that purpose : as I never had an opportunity to peruse a copy of that edition , I cannot say how well the translator performed his task. Having now parted with the copy-right of the book, I have farther added four new chapters to it (10, 11, B. I. ; 19, 20, B. II.), by way of taking a final leave of it ; and , in order the more completely to effect this, I may perhaps give , in a few months , a French edition of the same (which I cannot tell why I have not done sooner), in which all the above-mentioned additions , translated by myself , shall be inserted.

In one of the former additional chapters (the

17th, B. II.) mention is made of a peculiar circumstance attending the English government, considered as a monarchy, which is the solidity of the power of the crown. As one proof of this peculiar solidity, it is remarked, in that chapter, that all the monarchs, who ever existed in any part of the world, were never able to maintain their ground against certain powerful subjects (or a combination of them) without the assistance of regular forces at their constant command; whereas it is evident that the power of the crown, in England, is not at this day supported by such means; nor even had the English kings a guard of more than a few scores of men, when their power, and the exertions they at times made of it, were equal to what has ever been related of the most absolute Roman emperors.

The cause of this peculiarity in the English government is said, in the same chapter, to lie in the circumstance of the great or powerful men, in England, being divided into two distinct assemblies, and, at the same time, in the principles on which such a division is formed. To attempt to give a demonstration of this assertion otherwise than by facts, (as is done in the chapter here alluded to,) would lead into difficulties which the reader is little aware of. In general, the science of politics, considered as an *exact science* (that is to say, as a science capable of actual demonstration), is infinitely deeper than the reader suspects. The knowledge of man,

on which such a science, with its preliminary *axioms* and *definitions*, is to be grounded, has hitherto remained surprisingly imperfect. As one instance how little man is known to himself, it might be mentioned, that no tolerable explanation of that continual human phenomenon, laughter, has been yet given; and the powerful complicate sensation which each sex produces in the other, still remains an equally inexplicable mystery.

To conclude the above digression (which may do very well for a preface) I shall only add, that those speculators who will amuse themselves in seeking for the *demonstration* of the political theorem above expressed, will thereby be led through a field of observations which they will at first little expect; and, in their way towards attaining such demonstration, will find the science, commonly called Metaphysics, to be at best but a very superficial one, and that the Mathematics, or at least the mathematical reasonings, hitherto used by men, are not so completely free from error as has been thought¹.

¹ Certain errors that are not discovered, are, in several cases, compensated by others which are equally unperceived.

Continuing to avail myself of the indulgence an author has a right to claim in a preface, I shall mention, as a farther explanation of the peculiarity in the English government above alluded to, and which is

Out of the four chapters added to the present edition, two (the 10th and 11th, B. I.) contain, among other things, a few strictures on the Courts of Equity; in which I wish it may be found I have not been mistaken: of the two others, one (19th, B. II.) contains a few observations on the attempts that may, in different circumstances, be made, to set new limits to the authority of the crown; and, in the 20th, a few general thoughts are introduced on the right of taxation, and on the claim of the American colonists in that respect. Any farther observations I may make on the English government, such as comparing it with the other governments of Europe, and examining what difference in the manners of the inhabitants of this country may have resulted from it, must come in a new work, if I ever undertake to treat these subjects. In regard to the American disputes, what I may hereafter write on that account will be introduced in a work, which I may at some future time publish, under the title of *Histoire de George Trois, Roi d'Angleterre*; or, perhaps, of *Histoire d'Angleterre, depuis l'année 1765* (that in which the American stamp-duty was laid)

again touched upon in the postscript to this advertisement¹, that a government may be considered as a great *ballet*, or dance, in which, as in other ballets, every thing depends on the disposition of the figures.

jusques à l'année 1778—meaning that in which an end shall be put to the present contest.

Nov. 1781.

POSTSCRIPT.

Notwithstanding the intention above expressed, of making no additions to the present work, I have found it necessary, in this new edition, to render somewhat more complete the 17th chapter, Book II. *On the peculiar foundations of the English monarchy, as a monarchy* : as I found its tendency not to be very well understood ; and, in fact, that chapter contained little more than hints on the subject mentioned in it ; the task, in the course of writing, has increased beyond my expectation, and has swelled the chapter to about sixty pages above what it was in the former edition, so as almost to make it a kind of separate book by itself. The reader will now find, that, in several remarkable new instances, it proves the fact of the peculiar *stability* of the executive power of the British crown, and exhibits a much more complete delineation of the advantages that result from that stability in favour of public liberty.

These advantages may be enumerated in the

' A certain book, written in French, on the subject of the American disputes, was, I have been told, lately attributed to me, in which I had no share.

following order : I. The numerous restraints the governing authority is able to bear, and the extensive freedom it can afford to allow the subject, at its own expense : II. The liberty of speaking and writing, carried to the great extent it is in England : III. The unbounded freedom of the debates in the legislature : IV. The power to bear the constant union of all orders of subjects against its prerogatives : V. The freedom allowed to all individuals to take an active part in government concerns : VI. The strict impartiality with which justice is dealt to all subjects, without any respect whatever of persons : VII. The lenity of the criminal law, both in regard to the mildness of punishments and the frequent remission of them : VIII. The strict compliance of the governing authority with the letter of the law : IX. The needlessness of an armed force to support itself by, and, as a consequence, the singular subjection of the military to the civil power.

The above-mentioned advantages are peculiar to the English government. To attempt to imitate them, or transfer them to other countries, with that degree of extent to which they are carried in England, without at the same time transferring the whole order and conjunction of circumstances in the English government, would prove unsuccessful attempts. Several articles of English liberty already appear impracticable to be preserved in the new American

commonwealths. The Irish nation have of late succeeded in imitating several very important regulations in the English government, and are very desirous to render the assimilation complete; yet, it is possible they will find many inconveniences arise from their endeavours, which do not take place in England, notwithstanding the very great general similarity of circumstances in the two kingdoms in many respects; and even also, we might add, notwithstanding the respectable power and weight the crown derives from its British dominions, both for defending its prerogative in Ireland, and preventing anarchy: I say, the similarity in *many respects* between the two kingdoms; for this resemblance may perhaps fail in regard to some important points: however, this is a subject about which I shall not attempt to say any thing, not having the necessary information.

The last chapter in the work, concerning the nature of the *divisions that take place in this country*, I have left in every English edition as I wrote it at first in French. With respect to the exact manner of the debates in parliament, mentioned in that chapter, I cannot well say more at present than I did at that time, as I never had an opportunity to hear the debates in either house. In regard to the divisions in general to which the spirit of party gives rise, I did, perhaps, the bulk of the people somewhat more honour than they really deserve, when I

represented them as being free from any violent dispositions in that respect : I have since found, that, like the bulk of mankind in all countries, they suffer themselves to be influenced by vehement prepossessions for this or that side of public questions, commonly in proportion as their knowledge of the subject is imperfect. It is, however, a fact, that political prepossessions and party - spirit are not productive, in this country, of those dangerous consequences which might be feared from the warmth with which they are sometimes manifested. But this subject, or, in general, the subject of the political quarrels and divisions in this country, is not an article one may venture to meddle with in a single chapter, I have therefore let this subsist without touching it.

I shall however observe, before I conclude, that an accidental circumstance in the English government prevents the party-spirit, by which the public are usually influenced, from producing those lasting and rancorous divisions in the community which have pestered so many other free states, making of the same nation, as it were, two distinct people, in a kind of constant warfare with each other. The circumstance I mean, is the frequent reconciliations (commonly to quarrel again afterward) that take place between the leaders of parties, by which the most violent and ignorant class of their partisans are bewildered, and made to lose the scent. By the

frequent coalitions between *whig* and *tory* leaders, even that party-distinction, the most famous in the English history, has now become useless: the meaning of the words has thereby been rendered so perplexed, that nobody can any longer give a tolerable definition of them; and those persons who, now and then, aim at gaining popularity by claiming the merit of belonging to either party, are scarcely understood. The late *coalition* between two certain leaders has done away, and prevented from settling, that violent party-spirit to which the administration of lord Bute had given rise, and which the American disputes had carried still farther. Though this coalition has met with much obloquy, I take the liberty to rank myself in the number of its advocates, so far as the circumstance here mentioned.

May, 1784.

THE CONSTITUTION OF ENGLAND.

INTRODUCTION.

THE spirit of philosophy, which peculiarly distinguishes the present age, after having corrected a number of errors fatal to society, seems now to be directed towards the principles of society itself; and we see prejudices vanish which are difficult to overcome, in proportion as it is dangerous to attack them. ¹ This rising freedom of sentiment, the necessary forerunner of political freedom, led me to imagine that it would not be unacceptable to the public to be made acquainted with the principles of a constitution on which the eye of curiosity seems now to be

¹ As every popular notion which may contribute to the support of an arbitrary government is at all times vigilantly protected by the whole strength of it, political prejudices are last of all, if ever, shaken off by a nation subjected to such a government. A great change in this respect, however, has of late taken place in France, where this book was first published; and opinions are now discussed there, and tenets avowed, which, in the time of Louis the Fourteenth, would have appeared downright blasphemy; it is to this an allusion is made above.

universally turned, and which, though celebrated as a model of perfection, is yet but little known to its admirers.

I am aware that it will be deemed presumptuous in a man who has passed the greatest part of his life out of England, to attempt a delineation of the English government—a system which is supposed to be so complicated, as not to be understood or developed but by those who have been initiated in the mysteries of it from their infancy.

But, though a foreigner in England, yet, as a native of a free country, I am no stranger to those circumstances which constitute or characterise liberty. Even the great disproportion between the republic of which I am a member (and in which I formed my principles), and the British empire, has perhaps only contributed to facilitate my political inquiries.

As the mathematician, the better to discover the proportions he investigates, begins with freeing his *equation* from *coefficients*, or such other quantities as only perplex without properly constituting it; so it may be advantageous to the inquirer after the causes that produce the equilibrium of a government, to have previously studied them, disengaged from the apparatus of fleets, armies, foreign trade, distant and extensive dominions; in a word, from all those brilliant circumstances which so greatly affect the external appearance of a powerful society,

but have no essential connexion with the real principles of it.

It is upon the passions of mankind, that is, upon causes which are unalterable, that the action of the various parts of a state depends. The machine may vary as to its dimensions; but its movement and acting springs still remain intrinsically the same; and that time cannot be considered as lost which has been spent in seeing them act and move in a narrower circle.

One other consideration I will suggest, which is, that the very circumstance of being a foreigner may of itself be attended, in this case, with a degree of advantage. The English themselves (the observation cannot give them any offence), having their eyes open, as I may say, upon their liberty, from their first entrance into life, are perhaps too much familiarised with its enjoyment, to inquire, with real concern, into its causes. Having acquired practical notions of their government long before they have meditated on it, and these notions being slowly and gradually imbibed, they at length behold it without any high degree of sensibility; and they seem to me, in this respect, to be like the recluse inhabitant of a palace, who is perhaps in the worst situation for attaining a complete idea of the whole, and never experienced the striking effect of its external structure and elevation; or, if you please, like a man, who, having always had a beautiful and extensive scene before his

eyes, continues for ever to view it with indifference.

But a stranger—beholding at once the various parts of a constitution displayed before him, which, at the same time that it carries liberty to its height, has guarded against inconveniences seemingly inevitable; beholding, in short, those things carried into execution which he had ever regarded as more desirable than possible, is struck with a kind of admiration; and it is necessary to be thus strongly affected by objects, to be enabled to reach the general principle which governs them.

Not that I mean to insinuate that I have penetrated with more acuteness into the constitution of England than others; my only design, in the above observations, was, to obviate an unfavourable, though natural prepossession; and if, either in treating of the causes which originally produced the English liberty, or of those by which it continues to be maintained, my observations should be found new or singular, I hope the English reader will not condemn them, but where they shall be found inconsistent with history, or with daily experience. Of readers in general I also request, that they will not judge of the principles I shall lay down, but from their relation to those of human nature; a consideration which is almost the only one essential, and has been hitherto too much neglected by the writers on the subject of government.

BOOK I.

A SURVEY OF THE VARIOUS POWERS INCLUDED IN
THE ENGLISH CONSTITUTION, AND OF THE LAWS
BOTH IN CIVIL AND CRIMINAL CASES.

CHAP. I.

*Causes of the liberty of the English nation.
Reasons of the difference between the go-
vernment of England and that of France.
In England, the great power of the crown,
under the Norman kings, created a union
between the nobility and the people.*

WHEN the Romans, attacked on all sides by the barbarians, were reduced to the necessity of defending the centre of their empire, they abandoned Great Britain, as well as several other of their distant provinces. The island, thus left to itself, became a prey to the nations inhabiting the shores of the Baltic, who, having first destroyed the ancient inhabitants, and for a long time reciprocally annoyed each other, established several sovereignties in the southern part of the island, afterward called England, which at length were united, under Egbert, into one kingdom.

The successors of this prince, denominated the Anglo-Saxon princes, among whom Alfred the Great and Edward the Confessor are particularly celebrated, reigned for about two hundred years : but though our knowledge of the principal events of this early period of the English history is in some degree exact, yet we have but vague and uncertain accounts of the nature of the government which those nations introduced.

It appears to have had little more affinity with the present constitution than the general relation common indeed to all the governments established by the northern nations—that of having a king and a body of nobility; and the ancient Saxon government is ‘left us in story (to use the expressions of sir William Temple on the subject), but like so many antique, broken, or defaced pictures, which may still represent something of the customs and fashions of those ages, though little of the true lines, proportions, or resemblance.’¹

It is at the era of the Conquest that we are to look for the real foundation of the English constitution. From that period, says Spelman, *novus seclorum nascitur ordo*.² William of Norman-

¹ See his Introduction to the History of England.

² See Spelman, *Of Parliaments*.—It has been a favourite thesis with many writers, to pretend that the Saxon government was, at the time of the Conquest,

dy, having defeated Harold, and made himself master of the crown, subverted the ancient fabric of the Saxon legislation : he exterminated, by no means subverted; that William of Normandy legally acceded to the throne, and consequently to the engagement of the Saxon kings; and much argument has in particular been employed with regard to the word *conquest*, which, it has been said, in the feudal sense, only meant *acquisition*. These opinions have been particularly insisted upon in times of popular opposition : and, indeed, there was far greater probability of success, in raising among the people the notions (familiar to them) of legal claims and long-established customs, than in arguing with them from the no less rational, but less determinate, and somewhat dangerous doctrines, concerning the original rights of mankind, and the lawfulness of at all times opposing force to an oppressive government.

But if we consider that the manner in which the public power is formed in a state is so very essential a part of its government, and that a thorough change in this respect was introduced into England by the Conquest, we shall not scruple to allow that a new *government* was established, nay, as almost the whole landed property in the kingdom was at that time transferred to other hands, a new system of criminal justice introduced, and the language of the law moreover altered, the revolution may be said to have been such as is not perhaps to be paralleled in the history of any other country.

Some Saxon laws, favourable to the liberty of the people, were indeed again established under the suc-

or expelled, the former occupiers of lands, in order to distribute their possessions among his followers; and established the feudal system of

cessors of William; but the introduction of some new modes of proceeding in the courts of justice, and of a few particular laws, cannot, so long as the ruling power in the state remains the same, be said to be the introduction of a new government; and as, when the laws in question were again established, the public power in England continued in the same channel where the Conquest had placed it, they were more properly new modifications of the Anglo-Norman constitution than they were the abolition of it; or, since they were again adopted from the Saxon legislation, they were rather imitations of that legislation, than the restoration of the Saxon government.

Contented, however, with the two authorities I have above quoted, I shall dwell no longer on a discussion of the precise identity, or difference, of two governments; that is, of two ideal systems, which only exist in the conceptions of men. Nor do I wish to explode a doctrine which, in the opinion of some persons, giving an additional sanction and dignity to the English government, contributes to increase their love and respect for it. It will be sufficient for my purpose, if the reader shall be pleased to grant, that a material change was, at the time of the Conquest, effected in the government then existing, and is accordingly disposed to admit the proofs that will presently be laid before him, of such change having prepared the establishment of the present English constitution.

government, as better adapted to his situation, and indeed the only one of which he possessed a competent idea.

This sort of government prevailed also in almost all the other parts of Europe. But, instead of being established by dint of arms, and all at once, as in England, it had only been established on the continent, and particularly in France, through a long series of slow successive events: a difference of circumstances this, from which consequences were in time to arise as important as they were at first difficult to be foreseen.

The German nations who passed the Rhine to conquer Gaul were in a great degree independent; their princes had no other title to their power, but their own valour and the free election of the people; and as the latter had acquired in their forests but contracted notions of sovereign authority, they followed a chief less in quality of subjects, than as companions in conquest.

Besides, this conquest was not the irruption of a foreign army, which only takes possession of fortified towns;—it was the general invasion of a whole people in search of new habitations; and as the number of the conquerors bore a great proportion to that of the conquered, who were at the same time enervated by long peace, the expedition was no sooner completed than all danger was at an end, and of course their

union also. After dividing among themselves what lands they thought proper to occupy, they separated; and though their tenure was at first only precarious, yet, in this particular, they depended not on the king, but on the general assembly of the nation ¹.

Under the kings of *the first race*, the fiefs, by the mutual connivance of the leaders, at first became annual; afterward held for life. Under the descendants of Charlemagne they became hereditary ². And when at length Hugh Capet effected his own election, to the prejudice of Charles of Lorrain, intending to render the crown, which in fact was a fief, hereditary in his own family ³, he established the hereditaryship of fiefs as a general principle; and from this epoch authors date the complete establishment of the feudal system in France.

¹ The fiefs were originally called *terræ jure beneficii concessæ*; and it was not till under Charles *le Gros* that the term *fief* began to be in use. See *Beneficium*, Gloss. du Cange.

² 'Apud Francos vero, sensim pedetentimque jure hæreditario ad hæredes subinde transierunt feuda; quod habente seculo nono incepit.' See *Feudum*, Du Cange.

³ Hotoman has proved beyond a doubt, in his *Franco-Gallia*, that, under the two first races of kings, the crown of France was elective. The princes of the reigning family had nothing more in their favour than the custom of choosing one of that house.

On the other hand, the lords who gave their suffrages to Hugh Capet forgot not the interest of their own ambition. They completed the breach of those feeble ties which subjected them to the royal authority, and became every where independent. They left the king no jurisdiction, either over themselves, or their vassals; they reserved the right of waging war with each other; they even assumed the same privilege, in certain cases, with regard to the king himself¹; so that if Hugh Capet, by rendering the crown hereditary, laid the foundation of the greatness of his family, and of the crown itself, yet he added little to his own authority, and acquired scarcely any thing more than a nominal superiority over the number of sovereigns who then swarmed in France².

¹ The principal of these causes was, when the king refused to appoint judges to decide a difference between himself and one of his first barons, the latter had then a right to take up arms against the king; and the subordinate vassals were so dependent on their immediate lords, that they were obliged to follow them against the lord paramount. St. Louis, though the power of the crown was in his time much increased, was obliged to confirm both this privilege of the first barons and this obligation of their vassals.

² ' The grandes of the kingdom (says Mezeray) thought that Hugh Capet ought to put up with all their insults, because they had placed the crown on his head: nay, so great was their licentiousness, that,

But the establishment of the feudal system in England was an immediate and sudden consequence of that conquest which introduced it. Besides, this conquest was made by a prince who kept the greater part of his army in his own pay, and who was placed at the head of a people over whom he was an hereditary sovereign, — circumstances which gave a totally different turn to the government of that kingdom.

Surrounded by a warlike, though a conquered nation, William kept on foot part of his army. The English, and after them the Normans themselves, having revolted, he crushed both; and the new king of England, at the head of victorious troops, having to do with two nations lying under a reciprocal check from the enmity they bore to each other, and moreover, equally subdued by a sense of their unfortunate attempts of resistance, found himself in the most favourable circumstances for becoming an absolute monarch; and his laws, thus promulgated in the midst, as it were, of thunder and lightning, imposed the yoke of despotism both on the victors and the vanquished.

on his writing to Audebert, viscount of Perigueux, ordering him to raise the siege he had laid to Tours, and asking him, by way of reproach, who had made him a viscount? that nobleman haughtily answered, *Not you, but those who made you a king.* (Ce n'est pas vous, mais ceux qui vous ont fait roi.)'

He divided England into sixty thousand two hundred and fifteen military fiefs, all held of the crown; the possessors of which were, on pain of forfeiture, to take up arms, and repair to his standard on the first signal: he subjected, not only the common people, but even the barons, to all the rigours of the feudal government: he even imposed on them his tyrannical forest laws¹.

He assumed the prerogative of imposing taxes. He invested himself with the whole executive power of government. But what was of the greatest consequence he arrogated to himself the most extensive judicial power, by the establishment of the court which was called *Aula Regis*—a formidable tribunal, which received appeals from all the courts of the barons, and decided, in the last resort, on the estates, honour, and lives of the barons themselves; and which, being wholly composed of the great officers of the crown, removable at the king's pleasure,

¹ He reserved to himself an exclusive privilege of killing game throughout England, and enacted the severest penalties on all who should attempt it without his permission. The suppression, or rather mitigation of these penalties, was one of the articles of the *Charta de Foresta*, which the barons afterward obtained by force of arms. *Nullus de cætero amittat vitam, vel membra, pro venatione nostrâ.* Ch. de Forest. Art. 10.

and having the king himself for president, kept the first nobleman in the kingdom under the same control as the meanest subject.

Thus, while the kingdom of France, in consequence of the slow and gradual formation of the feudal government, found itself, in the issue, composed of a number of parts simply placed by each other, and without any reciprocal adherence; the kingdom of England, on the contrary, from the sudden and violent introduction of the same system, became a compound of parts united by the strongest ties; and the regal authority, by the pressure of its immense weight, consolidated the whole into one compact indissoluble body.

To this difference in the original constitution of France and England, that is, in the original power of their kings, we are to attribute the difference, so little analogous to its original cause of their present constitutions. This furnishes the solution of a problem, which, I must confess, for a long time perplexed me, and explains the reason why, of two neighbouring nations, situated almost under the same climate, and having one common origin, the one had attained the summit of liberty, the other has gradually sunk under an absolute necessity.

In France, the royal authority was indeed inconsiderable; but this circumstance was by no means favourable to the general liberty. The lords were every thing; and the bulk of the

nation were accounted nothing. All those wars which were made on the king had not liberty for their object; for of this the chiefs already enjoyed too great a share; they were the mere effect of private ambition or caprice. The people did not engage in them as associates in the support of a cause common to all; they were dragged, blindfold, and like slaves, to the standard of their leaders. In the mean time, as the laws, by virtue of which their masters were considered as vassals, had no relation to those by which they were themselves bound as subjects, the resistance, of which they were made the instruments, never produced any advantageous consequence in their favour; nor did it establish any principle of freedom that was applicable to them.

The inferior nobles, who shared in the independence of the superior nobility, added the effects of their own insolence to the despotism of so many sovereigns; and the people, wearied out by sufferings, and rendered desperate by oppression, at times attempted to revolt. But being parcelled out into so many different states, they could never perfectly agree either in the nature or the times of their complaints. The insurrections, which ought to have been general, were only successive, and particular. In the mean time, the lords, ever uniting to avenge their common cause as masters, fell with irresistible advantage on men who were divided: the people

were thus separately, and by force, brought back to their former yoke; and liberty, that precious offspring, which requires so many favourable circumstances to foster it, was every where stifled in its birth.¹

At length, when by conquests, by escheats, or by treaties, the several provinces came to be *re-united*² to the extensive and continually increasing dominions of the monarch, they became subject to their new master, already trained to obedience. The few privileges which the cities had been able to preserve were little respected by a sovereign who had himself entered into no engagement for that purpose; and as the *re-unions* were made at different times, the king was always in a condition to overwhelm every new province that accrued to him, with the weight of all those he already possessed.

As a farther consequence of these differences between the times of the *re-unions*, the several parts of the kingdom entertained no views of assisting each other. When some reclaimed their

¹ It may be seen in Mezeray, how the Flemings, at the time of the great revolt, which was caused, as he says, 'by the inveterate hatred of the nobles (*les gentils-hommes*) against the people of Ghent,' were crushed by the union of almost all the nobility of France. See Mezeray, Reign of Charles VI.

² The word *re-union* expresses in the French law, or history, the reduction of a province to an immediate dependence on the crown.

privileges, the others, long since reduced to subjection, had always forgotten theirs. Besides, those privileges, by reason of the differences of the governments under which the provinces had formerly been held, were also almost every where different : the circumstances which happened in one place thus bore little affinity to those which fell out in another ; the spirit of union was lost, or rather had never existed : each province, restrained within its particular bounds, only served to ensure the general submission ; and the same causes, which had reduced that spirited nation to a yoke of subjection, concurred also to keep them under it.

Thus liberty perished in France, because it wanted a favourable culture and proper situation. Planted, if I may so express myself, but just beneath the surface, it presently expanded, and sent forth some large shoots ; but having taken no root, it was soon plucked up. In England, on the contrary, the seed lying at a great depth, and being covered with an enormous weight, seemed at first to be smothered ; but it vegetated with the greater force ; it imbibed a more rich and abundant nourishment ; its sap and juice became better assimilated, and it penetrated and filled up with its roots the whole body of the soil. It was the excessive power of the king which made England free, because it was this very excess that gave rise to the spirit of union, and of concerted resistance. Possessed of extensive

demesnes, the king found himself independent: invested with the most formidable prerogatives, he crushed at pleasure the most powerful barons in the realm. It was only by close and numerous confederacies, therefore, that these could resist his tyranny; they even were compelled to associate the people in them, and make them partners of public liberty.

Assembled with their vassals in their great halls, where they dispensed their hospitality, deprived of the amusements of more polished nations; naturally inclined, besides, freely to expatiate on objects of which their hearts were full; their conversation naturally turned on the injustice of the public impositions, on the tyranny of the judicial proceedings, and, above all, on the detested forest laws.

Destitute of an opportunity of cavilling about the meaning of laws, the terms of which were precise, or rather disdaining the resource of sophistry, they were naturally led to examine the first principles of society; they inquired into the foundations of human authority, and became convinced, that power, when its object is not the good of those who are subject to it, is nothing more than the *right of the strongest*, and may be repressed by the exertion of a similar right.

The different orders of the feudal government, as established in England, being connected by tenures exactly similar, the same maxims which were laid down as true against the lord para-

mount, in behalf of the lord of an upper fief, were likewise to be admitted against the latter, in behalf of the owner of an inferior fief. The same maxims were also to be applied to the possessor of a still lower fief : they farther descended to the freeman, and to the peasant ; and the spirit of liberty, after having circulated through the different branches of the feudal subordination, thus continued to flow through successive homogeneous channels : it forced a passage into the remotest ramifications ; and the principle of primeval equality became every where diffused and established — a sacred principle, which neither injustice nor ambition can erase ; which exists in every breast ; and, to exert itself, requires only to be awakened among the numerous and oppressed classes of mankind !

But when the barons, whom their personal consequence had at first caused to be treated with caution and regard by their sovereign, began to be no longer so—when the tyrannical laws of the Conqueror became still more tyrannically executed, the confederacy, for which the general oppression had paved the way, instantly took place. The lord, the vassal, the inferior vassal, all united. They even implored the assistance of the peasants and cottagers : and the haughty aversion with which, on the continent, the nobility repaid the industrious hands that fed them, was, in England, compelled to yield to the pres-

sing necessity of setting bounds to the royal authority.

The people, on the other hand, knew that the cause they were called upon to defend was a cause common to all : and they were sensible, besides, that they were the necessary supporters of it. Instructed by the example of their leaders, they spoke and stipulated conditions for themselves : they insisted that, for the future, every individual should be entitled to the protection of the law ; and thus did those rights, with which the lords had strengthened themselves, in order to oppose the tyranny of the crown, become a bulwark which was in time to restrain their own.

CHAP. II.

*A second advantage England had over France:
it formed one undivided state.*

It was in the reign of Henry the First, about forty years after the Conquest, that we see the above causes begin to operate. This prince, having ascended the throne to the exclusion of his elder brother, was sensible that he had no other means to maintain his power than by gaining the affection of his subjects ; at the same time, he perceived that it must be the affection of the whole nation : he therefore not only mitigated the rigour of the feudal laws, in favour of the lords, but also annexed as a condition to the

charter he granted, that the lords should allow the same freedom to their respective vassals. Care was even taken to abolish those laws of the Conqueror which lay heaviest on the lower classes of the people¹.

Under Henry the Second, liberty took a farther stride; and the ancient *trial by jury*, a mode of procedure which is at present one of the most valuable parts of the English law, made again though imperfectly, its appearance.

But these causes, which had worked but silently and slowly under the two Henries, who were princes in some degree just, and of great capacity, manifested themselves at once under the despotic reign of King John. The royal prerogative, and the forest laws, having been exer-

¹ Amongst others, the law of the *Curfeu*.—It might be matter of curious discussion to inquire what the Anglo-Saxon government would in process of time have become, and of course the government of England be at the present time, if the event of the Conquest had never taken place; which, by conferring an immense, as well as unusual power, on the head of the feudal system, compelled the nobility to contract a lasting and sincere union with the people. It is very probable that the English government would at this day be the same as that which long prevailed in Scotland (where the king and nobles engrossed, jointly, or by turns, the whole power of the state); the same as in Sweden, the same as in Denmark—countries whence the Anglo-Saxons came.

ted by this prince to a degree of excessive severity, he soon beheld a general confederacy formed against him : — and here we must observe another circumstance, highly advantageous as well as peculiar to England.

England was not, like France, an aggregation of a number of different sovereignties : it formed but one state, and acknowledged but one master, one general title. The same laws, the same kind of dependence, consequently the same notions, the same interests, prevailed through the whole. The extremities of the kingdom could at all times unite to give a check to the exertions of an unjust power. From the river Tweed to Portsmouth, from Yarmouth to the Land's End, all was in motion : the agitation increased from the distance, like the rolling waves of an extensive sea ; and the monarch, left to himself, and destitute of resources, saw himself attacked on all sides by a universal combination of his subjects.

No sooner was the standard set up against John, than his very courtiers forsook him. In this situation, finding no part of his kingdom less irritated against him than another, having no detached province which he could engage in his defence by promises of pardon or of peculiar concessions, the trivial though never-failing resources of government, he was compelled, with seven of his attendants, all that remained with him, to submit himself to the disposal of his sub-

jects ; and he signed at Runnymede¹ the charter of the Forest, together with that famous charter, which, from its superior and extensive importance is denominated *Magna Charta*.

By the former, the most tyrannical parts of the forest laws were abolished ; and by the latter, the rigour of the feudal laws was greatly mitigated in favour of the lords. But this charter did not stop there ; conditions were also stipulated in favour of the numerous body of the people who had concurred to obtain it, and who claimed, with sword in hand, a share in that security it was meant to establish. It was hence instituted by the Great Charter, that the same services which were remitted in favour of the barons should be in like manner remitted in favour of their vassals. This charter moreover established an equality of weights and measures throughout England ; it exempted the merchants from arbitrary impost, and gave them liberty to enter and depart the kingdom at pleasure : it even extended to the lowest orders of the state, since it enacted, that the *villain*, or bondman, should not be subject to the forfeiture of his implements of tillage. Lastly, by the thirty-ninth article of the same charter, it was enacted, that no subject should be exiled, or in any shape whatever molested, either in his person or effects, otherwise than by judgment of his peers, and

¹ Anno 1215.

according to the law of the land; ¹ — an article so important, that it may be said to comprehend the whole end and design of political societies : — and from that moment the English would have been a free people, if there were not an immense distance between the making of laws and the observing of them.

But though this charter wanted most of those supports which were necessary to ensure respect to it — though it did not secure to the poor and friendless any certain and legal methods of obtaining the execution of it (provisions which numberless transgressions alone could, in process of time, point out), — yet it was a prodigious advance towards the establishment of public liberty. Instead of the general maxims respecting the rights of the people and the duties of the prince (maxims against which ambition perpetually contends, and which it sometimes even openly and absolutely denies), here was substituted a written law, that is, a truth admitted by all parties, which no longer required the

¹ ‘Nullus liber homo capiatur, vel imprisonetur, vel dissesiatur de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis; aut utlagetur, aut exuletur, aut aliquo modo destruat; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus, justitiam vel rectum.’ Magna Chart. cap. xxxix. xl.

support of argument. The rights and privileges of the individual, as well in his person as in his property, became settled axioms. The Great Charter, at first enacted with so much solemnity, and afterward confirmed at the beginning of every succeeding reign, became like a general banner perpetually set up for the union of all classes of the people; and the foundation was laid on which those equitable laws were to rise, which offer the same assistance to the poor and weak as to the rich and powerful¹.

Under the long reign of Henry the Third, the differences which arose between the king and the nobles rendered England a scene of confusion. Amidst the vicissitudes which the

¹ The reader, to be more fully convinced of the reality of the causes to which the liberty of England has been here ascribed, as well as of the truth of the observations made at the same time on the situation of the people of France, needs only to compare the Great Charter, so extensive in its provisions, and in which the barons stipulated in favour even of the bondman, with the treaty concluded at St. Maur, October 29, 1465, between Louis XI. and several of the princes and peers of France. In this treaty, which was made in order to terminate a war that was called the war for the public good (*pro bono publico*), no provision was made but concerning the particular power of a few lords; not a word was inserted in favour of the people. It may be seen at large in the *Pièces Justificatives* annexed to the *Mémoires de Philippe de Comines*.

fortune of war produced in their mutual conflicts, the people became still more and more sensible of their importance, and so did, in consequence, both the king and the barons also. Alternately courted by both parties, they obtained a confirmation of the Great Charter, and even the addition of new privileges, by the statutes of Merton and of Marlebridge. But I hasten to reach the grand epoch of the reign of Edward the First, a prince who, from his numerous and prudent laws, has been denominated the English Justinian.

Possessed of great natural talents, and succeeding a prince whose weakness and injustice had rendered his reign unhappy, Edward was sensible that nothing but a strict administration of justice could, on the one side, curb a nobility, whom the troubles of the preceding reign had rendered turbulent, and, on the other, appease and conciliate the people, by securing the property of individuals. To this end, he made jurisprudence the principal object of his attention; and so much did it improve under his care, that the mode of process became fixed and settled; Judge Hale going even so far as to affirm, that the English laws arrived at once *et quasi per saltum*, at perfection, and that there was more improvement made in them during the first thirteen years of the reign of Edward, than in all the ages since his time.

But what renders this era particularly interes-

ting is, that it affords the first instance of the admission of the deputies of towns and boroughs into parliament ¹.

Edward, continually engaged in wars, either against Scotland or on the continent, seeing moreover his demesnes considerably diminished, was frequently reduced to the most pressing necessities. But though, in consequence of the spirit of the times, he frequently indulged himself in particular acts of injustice, yet he perceived that it was impossible to extend a general oppression over a body of nobles and a people who so well knew how to unite in a common cause. In order to raise subsidies, therefore, he was obliged to employ a new method, and to endeavour to obtain, through the consent of the people, what his predecessors had hitherto expected from their own power. The sheriffs were ordered ² to invite the towns and boroughs of the different counties to send deputies to parliament: and it is from this era that we are to date the origin of the house of commons.

It must be confessed, however, that these deputies of the people were not, at first, possessed of any considerable authority. They were far

¹ I mean their legal origin; for the earl of Leicester, who had usurped the power during part of the preceding reign, had called such deputies up to parliament before.

² Anno 1295.

from enjoying those extensive privileges, which, in these days, constitute the house of commons a collateral part of the government: they were in those times called up only to provide for the wants of the king,¹ and approve the resolutions taken by him and the assembly of the lords.¹ But it was nevertheless a great point gained, to have obtained the right of uttering their complaints, assembled in a body and in a legal way—to have acquired, instead of a dangerous resource of insurrections, a lawful and regular mean of influencing the motions of the government, and thenceforth to have become a part of it. Whatever disadvantage might attend the station at first allotted to the representatives of the people, it was soon to be compensated by the preponderance the people necessarily acqui-

¹ The end mentioned in the summons sent to the lords, was, *de arduis negociis regni tractaturi et consilium impensuri*: the requisition sent to the commons was, *ad faciendum et consentiendum*. The power enjoyed by the latter was even inferior to what they might have expected from the summons sent to them. ‘In most of the ancient statutes they are not so much as named; and in several, even when they are mentioned, they are distinguished as petitioners merely, the assent of the lords being expressed in contradistinction to the request of the commons.’—See on this subject the Preface to the Collection of the Statutes at Large, by Ruffhead, and the authorities quoted therein.

re, when they are enabled to act and move with method, and especially with concert¹.

And indeed this privilege of naming representatives, insignificant as it might then appear, presently manifested itself by the most considerable effects. In spite of his reluctance, and after many evasions unworthy of so great a king, Edward was obliged to confirm the Great Charter; he even confirmed it eleven times in the course of his reign. It was moreover enacted, that whatever should be done contrary to it, should be null and void; that it should be read twice a year in all cathedrals; and that the penalty of excommunication should be denounced against anyone who should presume to violate it¹.

At length he converted into an established law a privilege of which the English had hitherto

¹ France had indeed also her assemblies of the general estates of the kingdom, in the same manner as England had her parliament; but then it was only the deputies of the towns within the particular domain of the crown, that is, for a very small part of the nation, who, under the name of the *third estate*, were admitted in those estates; and it is easy to conceive that they acquired no great influence in an assembly of sovereigns who gave the law to their lord paramount. Hence, when these disappeared, the maxim became immediately established, *The will of the king is the will of the law*:—In old French, *Que veut le roy, ce veut la loy*.

² Confirmationes Chartarum, cap. 2—4.

had only a precarious enjoyment; and, in the statute *de tallagio non concedendo*, he decreed, that no tax should be laid, nor impost levied, without the joint consent of the lords and commons. ¹ A most important statute this, which, in conjunction with Magna Charta, forms the basis of the English constitution. If from the latter the English are to date the origin of their liberty, from the former they are to date the establishment of it: and as the Great Charter was the bulwark that protected the freedom of individuals, so was the statute in question the engine which protected the charter itself, and by the help of which the people were thenceforth to make legal conquests over the authority of the crown.

This is the period at which we must stop, in order to take a distant view, and contemplate the different prospect which the rest of Europe then presented.

The efficient causes of slavery were daily operating and gaining strength. The independence of the nobles on the one hand, the ignorance and weakness of the people on the other, con-

¹ ‘ Nullum tallagium vel auxilium, per nos, vel hæredes nostros; in regno nostro ponatur seu levetur, sine voluntate et assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium, et aliorum liberorum hominum de regno nostro.’ Stat. an. 24. Ed. I.

tinued to be extreme : the feudal government still continued to diffuse oppression and misery; and such was the confusion of it, that it even took away all hopes of amendment.

France, still bleeding from the extravagance of a nobility incessantly engaged in groundless wars, either with each other, or with the king, was again desolated by the tyranny of that same nobility, haughtily jealous of their liberty, or rather of their anarchy.¹ The people, oppressed by those who ought to have guided and protected them, loaded with insults by those who existed by their labour, revolted on all sides. But their tumultuous insurrections had scarcely any other object than that of giving vent to the anguish with which their hearts were filled. They had no thoughts of entering into a general combination; still less of changing the form of the government, and laying a regular plan of public liberty.

¹ Not contented with oppression, they added insult. — 'When the gentry (says Mezeray) pillaged and committed exactions on the peasantry, they called the poor sufferer, in derision, *Jacques bonhomme* (goodman James). This gave rise to a furious sedition, which was called the *Jacquerie*. It began at Beauvais in the year 1357, extending itself into most of the provinces of France, and was not appeased but by the destruction of part of those unhappy victims, thousands of whom were slaughtered.'

Having never extended their views beyond the fields they cultivated, they had no conception of those different ranks and orders of men, of those distinct and opposite privileges and prerogatives, which are all necessary ingredients of a free constitution. Hitherto confined to the same round of rustic employments, they little thought of that complicated fabric, which the more informed themselves cannot but with difficulty comprehend, when, by a concurrence of favourable circumstances, the structure has at length been reared, and stands displayed to their view.

In their simplicity they saw no other remedy for the national evils than the general establishment of the regal power, that is, of the authority of one common uncontrolled master, and only longed for that time which, while it gratified their revenge, would mitigate their sufferings, and reduce to the same level both the oppressors and the oppressed.

The nobility, on the other hand, bent solely on the enjoyment of a momentary independence, irrecoverably lost the affection of the only men who might in time support them; and, equally regardless of the dictates of humanity and of prudence, they did not perceive the gradual and continual advances of the royal authority, which was soon to overwhelm them all. Already were Normandy, Anjou, Languedoc, and Touraine, *re-united* to the crown;

Dauphiné, Champagne, and part of Guienne, were soon to follow: France was doomed at length to see the reign of Louis the Eleventh; to see her general estates first become useless, and be afterward abolished.

It was the destiny of Spain also to behold her several kingdoms united under one head;—she was fated to be in time ruled by Ferdinand and Charles the Fifth.¹ And Germany, where an elective crown prevented the *re-unions*,² was

¹ Spain was originally divided into twelve kingdoms, besides principalities, which, by treaties, and especially by conquests, were collected into three kingdoms; those of Castile, Arragon, and Granada. Ferdinand the Fifth, king of Arragon, married Isabella, queen of Castile; they made a joint conquest of the kingdom of Granada; and these three kingdoms, thus united, descended, in 1516, to their grandson Charles V. and formed the Spanish monarchy.—At this era, the kings of Spain began to be absolute; and the states of the kingdoms of Castile and Leon, ‘assembled at Toledo, in the month of November, 1539, were the last in which the three orders met; that is, the grandees, the ecclesiastics, and the deputies of the towns.’ See the History of Spain, by Ferreras.

² The kingdom of France, as it stood under Hugh Capet and his next successors, may, with a great degree of exactness, be compared with the German empire; but the imperial crown of Germany having, through a conjunction of circumstances, continued elective, the emperors, though vested with more high-

indeed to acquire a few free cities; but her people, parcelled into so many different dominions, were destined to remain subject to the arbitrary yoke of such of her different sovereigns as should be able to maintain their power and independence. In a word, the feudal tyranny which overspread the continent did not compensate, by any preparation of distant advantages, the present calamities it caused; nor was it to leave behind it, as it disappeared, any thing but a more regular kind of despotism.

But in England, the same feudal system, after having suddenly broken in like a flood, had deposited, and still continued to deposit, the noble seeds of the spirit of liberty, union, and sober resistance. So early as the time of Edward, the tide was seen gradually to subside: the laws which protect the person and property of the individual began to make their appearance; that admirable constitution, the result of a threefold power, insensibly arose;¹ and the eye might

sounding prerogatives than even the kings of France, laboured under very essential disadvantages: they could not pursue a plan of aggrandizement with the same steadiness as a line of hereditary sovereigns usually do; and the right to elect them, enjoyed by the greater princes of Germany, procured a sufficient power to these, to protect themselves, as well as the inferior lords, against the power of the crown.

¹ ‘ Now, in my opinion (says Philippe de Comines,

even then discover the verdant summits of that fortunate region that was destined to be the seat of philosophy and liberty, which are inseparable companions.

CHAP. III.

The subject continued.

THE representatives of the nation, and of the whole nation, were now admitted into parliament: the great point, therefore, was gained, that was one day to procure them the great influence which they at present possess, and the subsequent reigns afford continual instances of its successive growth.

Under Edward the Second, the commons began to annex petitions to the bills by which they granted subsidies; this was the dawn of their legislative authority.

Under Edward the Third, they declared that they would not in future acknowledge any law to which they had not expressly assented. Soon

in times not much posterior to those of Edward the First, and with the simplicity of the language of his times), among all the sovereignties I know in the world, that in which the public good is best attended to, and the least violence exercised on the people, is that of England.' *Mémoires de Comines*, livre v. chap. xviii.

after this they exerted a privilege, in which consists, at this time, one of the great balances of the constitution : they impeached, and procured to be condemned, some of the first ministers of state. Under Henry the Fourth, they refused to grant subsidies before an answer had been given to their petitions. In a word, every event of any consequence was attended with an increase of the power of the commons ;—increases, indeed, but slow and gradual, but which were peaceably and legally effected, and were the more fit to engage the attention of the people, and coalesce with the ancient principles of the constitution.

Under Henry the Fifth, the nation was entirely taken up with its wars against France ; and in the reign of Henry the Sixth began the fatal contests between the houses of York and Lancaster. The noise of arms alone was now to be heard : during the silence of the laws already in being, no thought was had of enacting new ones : and for thirty years together England presents a wide scene of slaughter and desolation.

At length, under Henry the Seventh, who, by his intermarriage with the house of York, united the pretensions of the two families, and a general peace was re-established, and the prospect of happier days seemed to open on the nation. But the long and violent agitation under which it had laboured, was to be followed by a long and painful recovery. Henry, mounting

the throne with sword in hand, and in great measure as a conqueror, had promises to fulfil as well as injuries to avenge. In the mean time, the people, wearied out by the calamities they had undergone, and longing only for repose, abhorred even the idea of resistance; so that the remains of an almost exterminated nobility beheld themselves left defenceless, and abandoned to the mercy of the sovereign.

The commons, on the other hand, accustomed to act only a second part in public affairs, and finding themselves bereft of those who had hitherto been their leaders, were more than ever afraid to form of themselves an opposition. Placed immediately, as well as the lords, under the eye of the king, they beheld themselves exposed to the same dangers. Like them, therefore, they purchased their personal security at the expense of public liberty; and in reading the history of the two first kings of the house of Tudor, we imagine ourselves reading the relation given by Tacitus of Tiberius and the Roman senate ¹.

The time, therefore, seemed to be arrived, at which England must submit in its turn, to the fate of the other nations of Europe. All those barriers which it had raised for the defence of its liberty, seemed to have only been able to postpone the inevitable effects of power.

¹ ‘Quanto quis illustrior, tanto magis falsi ac festinantes.’

But the remembrance of their ancient laws, of that great charter so often and so solemnly confirmed, was too deeply impressed on the minds of the English to be effaced by transitory evils. Like a deep and extensive ocean, which preserves an equability of temperature amidst all the vicissitudes of seasons, England still retained those principles of liberty which were so universally diffused through all orders of the people, and they required only a proper opportunity to manifest themselves.

England, besides, still continued to possess the immense advantage of being one undivided state.

Had it been, like France, divided into several distinct dominions, it would also have had several national assemblies. These assemblies, being convened at different times and places, for this and other reasons never could have acted in concert; and the power of withholding subsidies, a power so important, when it is that of disabling the sovereign, and binding him down to inaction, would then have only been the destructive privilege of irritating a master who would have easily found means to obtain supplies from other quarters.

The different parliaments or assemblies of these several states, having thenceforth no means of recommending themselves to their sovereign, but their forwardness in complying with his demands, would have vied with each other in granting what it would not only have been

fruitless, but even highly dangerous, to refuse. The king would not have failed soon to demand, as a tribute, a gift he must have been confident to obtain; and the outward forms of consent would have been left to the people only as additional means of oppressing them without danger.

But the king of England continued, even in the time of the Tudors, to have but one assembly, before which he could lay his wants, and apply for relief. How great soever the increase of his power was, a single parliament alone could furnish him with the means of exercising it; and whether it was that the members of this parliament entertained a deep sense of their advantages, or whether private interest exerted itself in aid of patriotism, they at all times vindicated the right of granting, or rather refusing, subsidies; and, amidst the general wreck of every thing they ought to have held dear, they at least clung obstinately to the plank which was destined to prove the instrument of their preservation.

Under Edward the Sixth, the absurd tyrannical laws against high-treason (instituted under Henry the Eighth) were abolished. But this young and virtuous prince having soon passed away, the blood-thirsty Mary astonished the world with cruelties, which nothing but the fanaticism of a part of her subjects could have enabled her to execute.

Under the long and brilliant reign of Eliza-

both, England began to breathe anew; and the Protestant religion, being seated once more on the throne, brought with it some more freedom and toleration.

The star-chamber, that effectual instrument of the tyranny of the two Henries, yet continued to subsist: the inquisitorial tribunal of the high commission was even instituted, and the yoke of arbitrary power lay still heavy on the subject. But the general affection of the people for a queen, whose former misfortunes had created such a general concern, the imminent dangers which England escaped, and the extreme glory attending that reign, lessened the sense of such exertions of authority as would, in these days, appear the height of tyranny, and served at that time to justify, as they still do to excuse, a princess whose great talents, though not her principles of government, render her worthy of being ranked among the greatest sovereigns.

Under the sway of the Stuarts, the nation began to recover from its long lethargy. James the First, a prince rather imprudent than tyrannical, drew back the veil which had hitherto disguised so many usurpations, and made an ostentatious display of what his predecessors had been contented to enjoy.

He was incessantly asserting, that the authority of kings was not to be controlled any more than that of God himself. Like Him, they were omnipotent; and those privileges to which the

people so clamorously laid claim, as their inheritance and birth-right, were no more than an effect of the grace and toleration of his royal ancestors¹.

Those principles, hitherto only silently adopted in the cabinet, and in the courts of justice, had maintained their ground in consequence of this very obscurity. Being now announced from the throne, and resounded from the pulpit, they spread a universal alarm. Commerce, besides, with its attendant arts, and, above all, that of printing diffused more salutary notions throughout all orders of the people : a new light began to rise upon the nation ; and the spirit of opposition frequently displayed itself in this reign, to which the English monarchs had not, for a long time past, been accustomed.

But the storm which was only gathering in clouds during the reign of James, began to mutter under Charles the First ; and the scene which opened to view, on the accession of that prince, presented the most formidable aspect.

The notions of religion, by a singular concurrence, united with the love of liberty : the same spirit which had made an attack on the established faith, now directed itself to politics : the royal prerogatives were brought under the same examination as the doctrines of the church of Rome

¹ See his Declarations made in parliament in the years 1610 and 1621.

had been submitted to; and as a superstitious religion had proved unable to support the test, so neither could an authority, pretended to be unlimited, be expected to bear it.

The commons, on the other hand, were recovering from the astonishment into which the extinction of the power of the nobles had at first thrown them. Taking a view of the state of the nation, and of their own, they became sensible of their whole strength; they determined to make use of it, and to repress a power which seemed, for so long a time, to have levelled every barrier. Finding among themselves men of the greatest capacity, they undertook that important task with method and by constitutional means; and thus had Charles to cope with a whole nation put in motion and directed by an assembly of statesmen.

And here we must observe how different were the effects produced in England, by the annihilation of the power of the nobility, from those which the same event had produced in France.

In France where, in consequence of the division of the people, and of the exorbitant power of the nobles, the people were accounted nothing—when the nobles themselves were suppressed, the work was completed.

In England, on the contrary, where the nobles had ever vindicated the rights of the people equally with their own—in England, where the people had successively acquired most effectual

means of influencing the motions of the government, and, above all, were undivided—when the nobles themselves were cast to the ground, the body of the people stood firm, and maintained the public liberty.

The unfortunate Charles however was totally ignorant of the dangers which surrounded him. Seduced by the example of the other sovereigns of Europe, he was not aware how different in reality his situation was from theirs; he had the imprudence to exert with rigour an authority which he had no ultimate resources to support: a union was at last effected in the nation, and he saw his enervated prerogatives dissipated with a breath. ¹ By the famous act called the Petition of Right, and a posterior act, to both

¹ It might here be objected, that when, under Charles the First, the regal power was obliged to submit to the power of the people, the king possessed other dominions besides England, viz. Scotland and Ireland, and therefore seemed to enjoy the same advantages as the kings of France, that of reigning over a divided empire or nation. But, to this it is to be answered, that, at the time we mention, Ireland, scarcely civilized, only increased the necessities, and consequently the dependance, of the king; while Scotland, through the conjunction of peculiar circumstances, had thrown off her obedience: and though those two states, even at present, bear no proportion to the compact body of the kingdom of England, and seem never to have been able, by their union with it, to procure to the

which he assented, the compulsory loans and taxes, disguised under the name of *benevolences*, were declared to be contrary to law; arbitrary imprisonments and the exercise of martial law, were abolished; the court of high commission, and the star-chamber were suppressed¹; and the constitution, freed from the apparatus of despotic powers with which the Tudors had obscured it, was restored to its ancient lustre. Happy had been the people, if their leaders, after having executed so noble a work, had contented themselves with the glory of being the benefactors of their country. Happy had been the king, if, obliged at last to submit, his sub-

king any dangerous resources, yet the circumstances which took place in both at the time of the Revolution, or since, sufficiently prove that it was no unfavourable circumstance to English liberty, that the great crisis of the reign of Charles the First, and the advance which the constitution was to make at that time, should precede the period at which the king of England might have been able to call in the assistance of two other kingdoms.

¹ The star-chamber differed from all the other courts of law in this: the latter were governed only by the common law, or immemorial customs and acts of parliament; whereas the former often admitted for law the proclamations of the king and council, and grounded its judgments upon them. The abolition of this tribunal, therefore, was justly looked upon as a great victory over regal authority.

mission had been sincere, and if he had become sufficiently sensible that the only resource he had left was the affection of his subjects.

But Charles knew not how to survive the loss of a power he had conceived to be indisputable : he could not reconcile himself to limitations and restraints so injurious, according to his notions, to sovereign authority. His discourse and conduct betrayed his secret designs; distrust took possession of the nation ; certain ambitious persons availed themselves of it to promote their own views ; and the storm, which seemed to have blown over, burst forth anew. The contending fanaticism of persecuting sects joined in the conflict between regal haughtiness and the ambition of individuals ; the tempest blew from every point of the compass ; the constitution was rent asunder ; and Charles exhibited in his fall an awful example to the universe.

The royal power being thus annihilated, the English made fruitless attempts to substitute a republican government in its stead. 'It was a curious spectacle,' says Montesquieu, 'to behold the vain efforts of the English to establish among themselves a democracy.' Subjected at first to the power of the principal leaders in the long parliament, they saw that power expire, only to pass without bounds into the hands of a protector. They saw it afterward parcelled out among the chiefs of different bodies of soldiers ; and thus shifting without end from one kind of

subjection to another, they were at length convinced, that an attempt to establish liberty in a great nation, by making the people interfere in the common business of government, is, of all attempts, the most chimerical: that the authority *of all*, with which men are amused, is, in reality, no more than the authority of a few powerful individuals, who divide the republic among themselves; and they at last rested in the bosom of the only constitution which is fit for a great state and a free people; I mean that in which a chosen number deliberate, and a single hand executes, but in which, at the same time, the public satisfaction is rendered, by the general relation and arrangement of things, a necessary condition of the duration of government.

Charles the Second therefore was called over; and he experienced on the part of the people that enthusiasm of affection which usually attends the return from a long alienation. He could not, however, bring himself to forgive them the inextinguishable crime of which he looked upon them to have been guilty. He saw with the deepest concern that they still entertained their former notions with regard to the nature of the royal prerogative; and, bent upon the recovery of the ancient powers of the crown, he only waited for an opportunity to break those promises which had procured his restoration.

But the very eagerness of his measures frustrated their success. His dangerous alliances on the

continent, and the extravagant wars in which he involved England, joined to the frequent abuse he made of his authority, betrayed his designs. The eyes of the nation were soon opened, and saw into his projects: when convinced, at length, that nothing but fixed and irresistible bounds can be an effectual check on the views and efforts of power, they resolved finally to take away those remnants of despotism which still made a part of the regal prerogative.

The military services due to the crown, the remains of the ancient feudal tenures, had been already abolished: the laws against heretics were now repealed: the statute for holding parliaments once at least in three years was enacted: the *Habeas Corpus* act, that barrier of the subject's personal safety, was established; and such was the patriotism of the parliaments, that it was under a king the most destitute of principle that liberty received its most efficacious supports.

At length, on the death of Charles, began a reign which affords a most exemplary lesson both to kings and people. James the Second, a prince of a more rigid disposition, though of a less comprehensive understanding than his late brother, pursued still more openly the project which had already proved so fatal to his family. He would not see that the great alterations which had successively been effected in the constitution, rendered the execution of it daily more and more impracticable: he imprudently suffered himself

to be exasperated at a resistance he was in no condition to overcome; and hurried away by a spirit of despotism and a monkish zeal, he ran headlong against the rock which was to wreck his authority.

He not only used in his declarations the alarming expressions of absolute power and unlimited obedience—he not only usurped to himself a right to dispense with the laws; but, moreover, sought to convert that destructive pretension to the destruction of those very laws which were held most dear by the nation, by endeavouring to abolish a religion for which they had suffered the greatest calamities, in order to establish on its ruins a mode of faith which repeated acts of the legislature had proscribed—and proscribed, not because it tended to establish in England the doctrines of transubstantiation and purgatory, doctrines in themselves of no political moment, but because the unlimited power of the sovereign had always been made one of its principal tenets.

To endeavour, therefore, to revive such a religion, was not only a violation of the laws, but was, by one enormous violation, to pave the way for others of a still more alarming nature. Hence the English, seeing that their liberty was attacked, even in its first principles, had recourse to that remedy which reason and nature point out to the people, when he who ought to be the guardian of the laws becomes their destroyer:

they withdrew the allegiance which they had sworn to James, and thought themselves absolved from their oath to a king who himself disregarded the oath he had made to his people.

But, instead of a revolution like that which dethroned Charles the First, which was effected by a great effusion of blood, and threw the state into a general and terrible convulsion, the dethronement of James proved a matter of short and easy operation. In consequence of the progressive information of the people, and the certainty of the principles which now directed the nation, the whole were unanimous. All the ties by which the people were bound to the throne were broken, as it were, by one single shock; and James, who, the moment before, was a monarch surrounded by subjects, became at once a simple individual in the midst of the nation.

That which contributes, above all, to distinguish this event as singular in the annals of mankind, is the moderation, I may even say the legality, which accompanied it. As if to dethrone a king, who sought to set himself above the laws, had been a natural consequence of, and provided for, by the principles of government, every thing remained in its place; the throne was declared vacant, and a new line of succession was established.

Nor was this all : care was had to repair the breaches that had been made in the constitution,

as well as to prevent new ones ; and advantage was taken of the rare opportunity of entering into an original and express compact between king and people.

An oath was required of the new king, more precise than had been taken by his predecessors ; and it was consecrated as a perpetual formula of such oaths. It was determined, that, to impose taxes without the consent of parliament, as well as to keep up a standing army in time of peace, are contrary to law. The power, which the crown had constantly claimed, of dispensing with the laws, was abolished. It was enacted, that the subject, of whatever rank or degree, had a right to present petitions to the king ¹. Lastly, the key-stone was put to the arch, by the final establishment of the liberty of the press ².

¹ The lords and commons, previous to the coronation of king William and queen Mary, had framed a bill which contained a declaration of the rights which they claimed in behalf of the people, and was in consequence called the *Bill of Rights*. This bill contained the articles above, as well as some others ; and, having received afterward the royal assent, became an act of parliament under the title of ‘ An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown.’—A. 1. William and Mary, sess. 2. cap. 2.

² The liberty of the press was, properly speaking, established only four years afterward, in consequence of the refusal which the parliament made at that

The Revolution of 1689 is therefore the third grand era in the history of the constitution of England. The Great Charter had marked out the limits within which the royal authority ought to be confined; some outworks were raised in the reign of Edward the First; but it was at the Revolution that the circumvallation was completed.

It was at this era that the true principles of civil society were fully established. By the expulsion of a king who had violated his oath, the doctrine of resistance, that ultimate resource of an oppressed people, was confirmed beyond a doubt. By the exclusion given to a family hereditarily despotic, it was finally determined that nations are not the property of kings. The principles of passive obedience, the divine and indefeasible right of kings—in a word, the whole scaffolding of false and superstitious notions, by which the royal authority had till then been supported, fell to the ground; and in the room of it were substituted the more solid and durable foundations of the love of order, and a sense of the necessity of civil government among mankind.

time to continue any longer the restrictions which had before been set upon it.

CHAP. IV.

Of the legislative power.

IN almost all the states of Europe, the will of the prince holds the place of law; and custom has so confounded the matter of right with the matter of fact, that their lawyers generally represent the legislative authority as essentially attached to the character of king; and the plenitude of his power seems to them necessarily to flow from the very definition of his title.

The English, placed in more favourable circumstances, have judged differently: they could not believe that the destiny of mankind ought to depend on a play of words, and on scholastic subtilties; they have therefore annexed no other idea to the word *king*, or *roy*, a word known also to their laws, than that which the Latians annexed to the word *rex*, and the northern nations to *cyning*.

In limiting, therefore, the power of their king, they have acted more consistently with the etymology of the word; they have acted also more consistently with reason, in not leaving the laws to the disposal of the person who is already invested with the public power of the state, that is, of the person who lies under the greatest and most important temptations to set himself above them.

The basis of the English constitution, the capital principle on which all others depend, is, that the legislative powers belong to parliament alone; that is to say, the power of establishing laws, and of abrogating, changing, or explaining them.

The constituent parts of parliament are, the king, the house of lords, and the house of commons.

The house of commons, otherwise the assembly of the representatives of the nation, is composed of the deputies of the different counties, each of which sends two; of the deputies of certain towns, of which London (including Westminster and Southwark) sends eight—other towns, two or one; and of the deputies of the universities of Oxford and Cambridge, each of which sends two.

Lastly, since the act of union, Scotland sends forty-five deputies, who, added to those just mentioned, make up the whole number five hundred and fifty-eight. Those deputies, though separately elected, do not solely represent the town or county that sends them, as is the case with the deputies of the United Provinces of the Netherlands, or of the Swiss Cantons; but, when they are once admitted, they represent the whole body of the nation.

The qualifications required for being a member of the house of commons are, for representing a county, to be born a subject of Great Britain,

and to be possessed of a landed estate of six hundred pounds a year; and of three hundred, for representing a town or borough.

The qualifications required for being an elector in a county are, to be possessed in that county, of a freehold of forty shillings a year¹. With regard to electors in towns or boroughs, they must be freemen of them; a word which now signifies certain qualifications expressed in the particular charters.

When the king has determined to assemble a parliament, he sends an order for that purpose to the lord-chancellor, who, after receiving the same, sends a writ, under the great seal of England, to the sheriff of every county, directing him to take the necessary steps for the election of members for the county, and the towns and boroughs contained in it. Three days after the reception of the writ, the sheriff must, in his turn, send his precept to the magistrates of the towns and boroughs, to order them to make their election within eight days after the receipt of the precept, giving four days' notice of the same. And the sheriff himself must proceed to the election for the county, not sooner than ten days after

¹ This freehold must have been possessed by the elector one whole year at least before the time of election, except it has devolved to him by inheritance, by marriage, by a last will, or by promotion to an office.

the receipt of the writ, nor later than sixteen.

The principal precautions, taken by the law, to ensure the freedom of elections, are, that any candidate, who, after the date of the writ, or even after the vacancy, shall have given entertainments to the electors of a place, or to any of them, in order to his being elected, shall be incapable of serving for that place in parliament; and that if any person gives, or promises to give, any money, employment, or reward, to a voter, in order to influence his vote, he, as well as the voter himself, shall be condemned to pay a fine of five hundred pounds, and for ever disqualified to vote, and hold any office in a corporation—the faculty, however, being reserved to both, of procuring indemnity for their own offence, by discovering some other offender of the same kind.

It has been moreover established, that no lord of parliament, or lord-lieutenant of a county, has any right to interfere in the elections of members; that any officer of the excise, customs, etc. who shall presume to intermeddle in elections, by influencing any voter to give or withhold his vote, shall forfeit one hundred pounds, and be disabled to hold any office. Lastly, all soldiers quartered in a place where an election is to be made, must move from it at least one day before the election, to the distance of two miles or more, and return not till one day after the election is finished.

The house of peers, or lords, is composed of

the lords spiritual, who are the archbishops of Canterbury, and of York, and the twenty-four bishops; and of the lords temporal, whatever may be their respective titles, such as dukes, marquises, earls, etc.

Lastly, the king is the third constitutive part of parliament: it is even he alone who can convoke it; and he alone can dissolve or prorogue it. The effect of a dissolution is, that from that moment the parliament completely ceases to exist; the commission, given to the members by their constituents, is at an end; and whenever a new meeting of parliament shall happen, they must be elected anew. A prorogation is an adjournment to a term appointed by the king; till which the existence of parliament is simply interrupted, and the function of the deputies suspended.

When the parliament meets, whether it be by virtue of new summons, or whether being composed of members formerly elected, it meets again at the expiration of the term for which it had been prorogued, the king either goes to it in person, invested with the *insignia* of his dignity, or appoints proper persons to represent him on that occasion, and opens the session, by laying before the parliament the state of the public affairs, and inviting it to take them into consideration. This presence of the king, either real or represented, is absolutely requisite at the first meeting; it is that which gives life to

the legislative bodies, and puts them in action.

The king, having concluded his declaration, withdraws. The parliament, which is then legally intrusted with the care of the national concerns, enters upon its functions, and continues to exist till it is prorogued or dissolved. The house of commons, and that of peers, assemble separately; the latter, under the presidency of the lord-chancellor; the former, under that of the speaker; and both separately adjourn to such days as they respectively think proper to appoint.

As each of the two houses has a negative on the propositions made by the other, and there is, consequently, no danger of their encroaching on each other's rights, or on those of the king, who has likewise his negative upon them both, any question judged by them conducive to the public good, without exception, may be made the subject of their respective deliberations. Such are, for instance, new limitations, or extensions to be given to the authority of the king; the establishing of new laws, or making changes in those already in being. Lastly, the different kinds of public provisions, or establishments—the various abuses of administration, and their remedies—become, in every session, the objects of the attention of parliament.

Here, however, an important observation must be made. All bills for granting money must have their beginning in the house of com

mons : the lords cannot take this object into their consideration but in consequence of a bill presented to them by the latter ; and the commons have at all times been so anxiously tenacious of this privilege , that they have never suffered the lords even to make any change in the money-bills which they have sent to them ; the lords are expected simply and solely either to accept or reject them.

This excepted , every member, in each house , may propose whatever question he thinks proper. If, after being considered , the matter is found to deserve attention , the person who made the proposition , usually with some others adjoined to him , is desired to set it down in writing. If, after more complete discussions of the subject , the proposition is carried in the affirmative , it is sent to the other house , that they may , in their turn , take it into consideration. If the other house reject the bill , it remains without any effect : if they agree to it , nothing remains wanting to its complete establishment but the royal assent.

When there is no business that requires immediate dispatch , the king usually waits till the end of the session , or at least till a certain number of bills are ready for him , before he declares his royal pleasure. When the time is come , the king goes to parliament in the same state with which he opened it ; and while he is seated on the throne , a clerk , who has a list of

the bills, gives, or refuses, as he reads, the royal assent.

When the royal assent is given to a public bill, the clerk says, *le roy le veut*. If the bill be a private bill, he says, *soit fait comme il est désiré*. If the bill has subsidies for its object, he says, *le roy remercie ses loyaux sujets, accepte leur bénévolence, et aussi le veut*.—Lastly, if the king does not think proper to assent to the bill, the clerk says, *le roy s'avisera*, which is a mild way of giving a refusal.

It is, however, pretty singular, that the king of England should make use of the French language to declare his intentions to his parliament. This custom was introduced at the Conquest¹, and has been continued, like other matters of form, which sometimes subsist for ages after the real substance of things has been altered: and Judge Blackstone expresses himself on this subject in the following words: 'A badge, it must be owned (now the only one remaining), of conquest; and which one would wish to see

¹ William the Conqueror added to the other changes he introduced the abolition of the English language in all public as well as judicial transactions, and substituted for it the French that was spoken in his time; hence the number of old French words that are met with in the style of the English laws. It was only under Edward III. that the English language began to be re-established in the courts of justice.

fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force.'

When the king has declared his different intentions, he prorogues the parliament.—Those bills which he has rejected remain without force; those to which he has assented become the expression of the will of the highest power acknowledged in England: they have the same binding force as the *édits enregistrés* have in France, and as the *populiscita* had in ancient Rome: in a word, they are laws.—And though each of the constituent parts of the parliament might, at first, have prevented the existence of those laws, the united will of all three is now necessary to repeal them.

CHAP. V.

Of the executive power.

WHEN the parliament is prorogued, or dissolved, it ceases to exist; but its laws still continue to be in force; the king remains charged with the execution of them, and is supplied with the necessary power for that purpose.

It is, however, to be observed, that though, in his political capacity of one of the constituent parts of the parliament (that is, with regard to the share allotted to him in the legislative au-

thority), the king is undoubtedly sovereign, and only needs allege his will when he gives or refuses his assent to the bills presented to him; yet, in the exercise of his powers of government, he is no more than a magistrate; and the laws, whether those that existed before him, or those to which, by his assent, he has given being, must direct his conduct, and bind him equally with his subjects.

I. The first prerogative of the king, in his capacity of supreme magistrate, has for its object the administration of justice.

1.^o He is the source of all judicial power in the state; he is the chief of all the courts of law, and the judges are only his substitutes; every thing is transacted in his name; the judgments must be with his seal, and are executed by his officers.

2.^o By a fiction of the law, he is looked upon as the universal proprietor of the kingdom: he is in consequence deemed directly concerned in all offences; and, for that reason, prosecutions are to be carried on in his name in the courts of law.

3.^o He can pardon offences, that is, remit the punishment that has been awarded in consequence of his prosecution.

II. The second prerogative of the king is, to be the *fountain of honour*, that is, the distributor of titles and dignities: he creates the peers of the realm, as well as bestows the different degrees

of inferior nobility. He moreover disposes of the different offices, either in the courts of law, or elsewhere.

III. The king is the superintendent of commerce; he has the prerogative of regulating weights and measures; he alone can coin money, and give a currency to foreign coin.

IV. He is the supreme head of the church. In this capacity he appoints the bishops, and the two archbishops; and he alone can convene the assembly of the clergy. This assembly is formed, in England, on the model of the parliament; the bishops form the upper house: deputies from the dioceses, and from the several chapters, form the lower house: the assent of the king is likewise necessary to the validity of their acts or canons; and the king can prorogue or dissolve the convocation.

V. He is, in right of his crown, the generalissimo of all sea or land forces whatever; he alone can levy troops, equip fleets, build fortresses, and fill all the posts in them.

VI. He is, with regard to foreign nations, the representative and the depository of all the power and collective majesty of the nation: he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper.

VII. In fine, what seems to carry so many powers to the height, is, its being a fundamental

maxim, that THE KING CAN DO NO WRONG : which does not signify, however, that the king has not the power of doing ill, or, as it was pretended by certain persons in former times, that every thing he did was lawful; but only that he is above the reach of all courts of law whatever, and that his person is sacred and inviolable.

CHAP. VI.

The boundaries which the constitution has set to the royal prerogative.

IN reading the foregoing enumeration of the powers with which the laws of England have intrusted the king, we are at a loss to reconcile them with the idea of a monarchy, which, we are told, is limited. The king not only unites in himself all the branches of the executive power; he not only disposes, without control, of the whole military power in the state; but he is, moreover, it seems, master of the law itself; since he calls up, and dismisses, at his will, the legislative bodies. We find him, therefore, at first sight, invested with all the prerogatives that ever were claimed by the most absolute monarchs; and we are at a loss to find that liberty which the English seem so confident they possess.

But the representatives of the people still have—and that is saying enough—they still

have in their hands, now that the constitution is fully established, the same powerful weapon which enabled their ancestors to establish it. It is still from their liberality alone that the king can obtain subsidies; and in these days, when every thing is rated by pecuniary estimation—when gold is become the great moving spring of affairs, it may be safely affirmed, that he who depends on the will of other men, with regard to so important an article, is (whatever his power may be in other respects) in a state of real dependance.

This is the case of the king of England. He has, in that capacity, and without the grant of his people, scarcely any revenue. A few hereditary duties on the exportation of wool, which (since the establishment of manufactures) are become tacitly extinguished; a branch of the excise, which, under Charles the Second, was annexed to the crown as an indemnification for the military services it gave up, and which, under George the Second, was fixed at seven thousand pounds; a duty of two shillings on every ton of wine imported; the wrecks of ships of which the owners remain unknown; whales and sturgeons thrown on the coast; swans swimming on public rivers; and a few other feudal relics, now compose the whole appropriated revenue of the king, and are all that remain of the ancient inheritance of the crown.

The king of England, therefore, has the pre-

rogative of commanding armies, and equipping fleets; but without the concurrence of his parliament he cannot maintain them. He can bestow places and employments; but without his parliament he cannot pay the salaries attending on them. He can declare war; but without his parliament it is impossible for him to carry it on. In a word, the royal prerogative, destitute as it is of the power of imposing taxes, is like a vast body, which cannot of itself accomplish its motions: or, if you please, it is like a ship completely equipped, but from which the parliament can at pleasure draw off the water, and leave it aground—and also set it afloat again, by granting subsidies.

And indeed we see, that, since the establishment of this right of the representatives of the people, to grant or refuse subsidies to the crown, their other privileges have been continually increasing. Though these representatives were not, in the beginning, admitted into parliament but upon the most disadvantageous terms, yet they soon found means, by joining petitions to their money-bills, to have a share in framing those laws by which they were in future to be governed; and this method of proceeding, which at first was only tolerated by the king, they afterward converted into an express right; by declaring, under Henry the Fourth, that they would not, thenceforward, come to any resolutions with regard to subsidies, before the

king had given a precise answer to their petitions.

In subsequent times we see the commons constantly successful, by their exertions of the same privilege, in their endeavours to lop off the despotic powers which still made a part of the regal prerogative. Whenever abuses of power had taken place, which they were seriously determined to correct, they made *grievances and supplies* (to use the expression of sir Thomas Wentworth) *go hand in hand together*, which always produced the redress of them. And, in general, when a bill, in consequence of its being judged by the commons essential to the public welfare, has been joined by them to a money-bill, it has seldom failed to *pass in that agreeable company* ^r.

^r In mentioning the forcible use which the commons have at times made of their power of granting subsidies, by joining provisions of a different nature to bills that had grants for their object, I only mean to shew the great efficiency of that power, which was the subject of this chapter, without pretending to say any thing as to the propriety of the measure. The house of lords have even found it necessary (which confirms what is said here) to form, as it were, a confederacy among themselves, for the security of their legislative authority, against the unbounded use which the commons might make of their power of taxation; and it has been made a standing order of their house, to reject any bill whatsoever to which a money-bill has been *tacked*.

CHAP. VII.

The same subject continued.

BUT this force of the prerogative of the commons, and the facility with which it may be exerted, however necessary for the first establishment of the constitution, might prove too considerable at present, when it is requisite only to support it. There might be the danger, that, if the parliament should ever exert their privilege to its full extent, the prince, reduced to despair, might resort to fatal extremities; or, that the constitution, which subsists only by virtue of its equilibrium, might in the end be subverted.

Indeed, this is a case which the prudence of parliament has foreseen. They have, in this respect, imposed laws upon themselves; and without touching the prerogative itself, they have moderated the exercise of it. A custom has for a long time prevailed, at the beginning of every reign, and in the kind of overflowing of affection which takes place between a king and his first parliament, to grant the king a revenue for his life: a provision which, with respect to the great exertions of his power, does not abridge the influence of the commons, but yet puts him in a condition to support the dignity of the crown, and affords him, who is the first magistrate in the nation, that independence which the laws ensure also to those magistrates who are particu-

larly intrusted with the administration of justice¹.

This conduct of the parliament provides an admirable remedy for the accidental disorders of the state. For though, by the wise distribution of the powers of government, great usurpations are become, in a manner, impracticable, nevertheless, it is impossible but that, in consequence of the continual (though silent) efforts of the executive power to extend itself, abuses will at length slide in. But here the powers, wisely kept in reserve by the parliament, afford the means of remedying them. At the end of each reign, the civil list, and consequently that kind of independence which it procured, are at an end. The successor finds a throne, a sceptre, and a crown; but he finds neither power nor even dignity : and before a real possession of all these things be given him, the parliament

¹ The twelve judges.—Their commissions, which in former times were often given them *durante bene placito*, now must always 'be made *quamdiu se bene gesserint*, and their salaries ascertained; but upon an address of both houses, it may be lawful to remove them' Stat. 13. Will. III. c. 2. In the first year of the reign of George III. it was moreover enacted, that the commission of the judges should continue in force, notwithstanding the demise of the king; which has prevented their being dependant, with regard to their continuation in office, on the heir-apparent.

have it in their power to take a thorough review of the state, as well as correct the several abuses that may have crept in during the preceding reign : and thus the constitution may be brought back to its first principles.

England, therefore, by this means, enjoys one very great advantage—one, that all free states have sought to procure for themselves ; I mean that of a periodical reformation. But the expedients which legislators have contrived for this purpose in other countries, have always, when attempted to be carried into practice, been found to be productive of very disadvantageous consequences. Those laws which were made in Rome, to restore that equality which is the essence of a democratical government, were always found impracticable ; the attempt alone endangered the overthrow of the republic ; and the expedient which the Florentines called *ri-pigliar il stato*, proved nowise happier in its consequences. This was because all those different remedies were destroyed beforehand, by the very evils they were meant to cure ; and the greater the abuses were, the more impossible it was to correct them.

But the means of reformation which the parliament of England has taken care to reserve to itself, is the more effectual, as it goes less directly to its end. It does not oppose the usurpations of prerogative, as it were, in front : it does not encounter it in the middle of its career, and in

the fullest flight of its exertion : but it goes in search of it to its source, and to the principle of its action. It does not endeavour forcibly to overthrow it; it only enervates its springs.

What increases still more the mildness of the operation is, that it is only to be applied to the usurpations themselves, and passes by what would be far more formidable to encounter, the obstinacy and pride of the usurpers.

Every thing is transacted with a new sovereign, who, till then, has had no share in public affairs, and has taken no step which he may conceive himself bound in honour to support. In fine, they do not wrest from him what the good of the state requires he should give up : he himself makes the sacrifice.

The truth of all these observations is remarkably confirmed by the events that followed the reign of the two last Henries. Every barrier that protected the people against the incursions of power had been broken through. The parliament, in their terror, had even enacted, that proclamations, that is, the will of the king, should have the force of laws¹; the constitution seemed really undone. Yet, on the first opportunity afforded by a new reign, liberty began again to make its appearance². And when the

¹ Stat. 31. Hen. VIII. chap. 8.

² The laws concerning treason, passed under Henry the Eighth, which Judge Blackstone calls 'an amazing

nation, at length recovered from its long supineness, had, at the accession of Charles the First, another opportunity of a change of sovereign, that enormous mass of abuses, which had been accumulating, or gaining strength, during five successive reigns, was removed, and the ancient laws were restored.

To which add, that this second reformation, which was so extensive in its effects, and might be called a new creation of the constitution, was accomplished without producing the least convulsion. Charles the First, in the same manner as Edward the Sixth (or his uncle, the regent duke of Somerset) had done in former times, assented to every regulation that was passed; and whatever reluctance he might at first manifest, yet the act called *the Petition of Right* (as well as the bill which afterward completed the work) received the royal sanction without bloodshed.

It is true, great misfortunes followed: but they were the effects of particular circumstances. The nature and extent of regal authority not having been accurately defined during the time which preceded the reigns of the Tudors, the exorbitant power of the princes of that house had gradually introduced political prejudices of even an extravagant kind: those prejudices,

heap of wild and new-fangled treasons, were, together with the statute just mentioned, repealed in the beginning of the reign of Edward VI.

having had a hundred and fifty years to take root, could not be shaken off but by a kind of general convulsion; the agitation continued after the action, and was carried to excess by the religious quarrels that arose at that time.

CHAP. VIII.

New restrictions.

THE commons, however, have not entirely relied on the advantages of the great prerogative with which the constitution has intrusted them.

Though this prerogative is, in a manner, out of danger of an immediate attack, they have nevertheless shewn at all times the greatest jealousy on its account. They never suffer, as we have observed before, a money-bill to begin any where but with themselves; and any alteration that may be made in it, in the other house, is sure to be rejected. If the commons had not most strictly reserved to themselves the exercise of a prerogative, on which their very existence depends, the whole might at length have slidden into that other body, which they might have suffered to share in it equally with them. If any other persons, besides the representatives of the people, had a right to make an offer of the produce of the labour of the people, the executive

power would soon have forgotten that it only exists for the advantage of the public ¹.

¹ As the crown has the undisputed prerogative of assenting to, and dissenting from, what bills it thinks proper, as well as of convening, proroguing, and dissolving the parliament whenever it pleases, the latter have no assurance of having a regard paid to their bills, or even of being allowed to assemble, but what may result from the need the crown stands in of their assistance: the danger in that respect is even greater for the commons than for the lords, who enjoy a dignity which is hereditary, as well as inherent to their persons, and form a permanent body in the state; whereas the commons completely vanish, whenever a dissolution takes place: there is therefore no exaggeration in what has been said above, that their *very being* depends on their power of granting subsidies to the crown.

Moved by these considerations, and, no doubt, by a sense of their duty towards their constituents, to whom this right of taxation originally belongs, the house of commons have at all times been very careful lest precedents should be established which might, in the most distant manner, tend to weaken that right. Hence the warmth, I might say the resentment, with which they have always rejected even the amendments proposed by the lords in their money-bills. The lords, however, have not given up their pretension to make such amendments; and it is only by the vigilance and constant predetermination of the commons to reject all alteration whatever made in their money-bills,

Besides, though this prerogative has of itself, we may say, an irresistible efficiency, the parliament has neglected nothing that may increase it, or at least the facility of its exercise; and though they have allowed the general prerogatives of the sovereign to remain undisputed, they have, in several cases, endeavoured to restrain the use he might make of them, by entering with him into divers express and solemn conventions for that purpose¹.

Thus the king is indisputably invested with the exclusive right of assembling parliaments: yet he must assemble one, at least once in three years; and this obligation on the king, which was insisted upon by the people in very early times, has been since confirmed by an act passed in the sixteenth year of the reign of Charles the Second.

Moreover, as the most fatal consequences might ensue, if laws, which might most materially affect public liberty, could be enacted in parliaments

without even examining them, that this pretension of the lords is reduced to be a useless, and only dormant, claim.

¹ Laws made to bind such powers in a state as have no superior power by which they may be legally compelled to the execution of them (for instance, the crown, as circumstanced in England), are nothing more than general conventions, or treaties, made with the body of the people.

abruptly and imperfectly summoned, it has been established, that the writs for assembling a parliament must be issued forty days at least before the first meeting of it. Upon the same principle it has also been enacted, that the king cannot abridge the term he has once fixed for a prorogation, except in the two following cases, *viz.* of a rebellion, or of imminent danger of a foreign invasion: in both which cases a fourteen-days' notice must be given¹.

Again, the king is the head of the church; but he can neither alter the established religion, nor call individuals to an account for their religious opinions.² He cannot even profess the religion which the legislature has particularly forbidden; and the prince who should profess it is declared incapable of *inheriting, possessing, or enjoying the crown of these kingdoms*³.

The king is the first magistrate; but he can make no change in the maxims and forms consecrated by law or custom. He cannot even influence, in any case whatever, the decision of causes between subject and subject: and

¹ Stat. 30. Geo. II. ch. 25.

² The convocation, or assembly of the clergy, of which the king is the head, can only regulate such affairs as are merely ecclesiastical; they cannot touch the laws, customs and statutes, of the kingdom. Stat. 25. Hen. VIII. c. 19.

³ I. Will. and M. stat. 2. c. 2.

James the First, assisting at the trial of a cause, was reminded by the judge, that he could deliver no opinion¹. Lastly, though crimes are prosecuted in his name, he cannot refuse to lend it to any particular persons who have complaints to prefer.

The king has the privilege of coining money: but he cannot alter the standard.

The king has the power of pardoning offenders; but he cannot exempt them from making a compensation to the parties injured. It is even established by law, that, in case of murder, the widow, or next heir, shall have a right to prosecute the murderer; and the king's pardon, whether it preceded the sentence passed in consequence of such prosecution, or whether it be granted after it, cannot have any effect².

The king has the military power; but still, with respect to this, he is not absolute. It is

¹ These principles have since been made an express article of an act of parliament; the same which abolished the starchamber. 'Be it likewise declared and enacted, by the authority of this present parliament, that neither his majesty nor his privy-council have, or ought to have, any jurisdiction, power, or authority, to examine or draw into question, determine, or dispose of, the lands, tenements, goods, or chattels, of any of the subjects of this kingdom.' Stat. 16. ch. I. cap. 10. §. 10.

² The method of prosecution mentioned here is called an *appeal*: it must be sued within a year and a day after the commission of the crime.

true, in regard to the sea-forces, as there is in them this very great advantage, that they cannot be turned against the liberty of the nation, at the same time that they are the surest bulwark of the island, the king may keep them as he thinks proper; and in this respect he lies only under the general restraint of applying to parliament for obtaining the means of doing it. But in regard to land-forces, as they may become an immediate weapon in the hands of power, for throwing down all the barriers of public liberty, the king cannot raise them without the consent of parliament. The guards of Charles the Second were declared anti-constitutional; and James's army was one of the causes of his being dethroned¹.

In these times, however, when it is become a custom with princes to keep those numerous armies, which serve as a pretext and means of oppressing the people, a state that would maintain its independence is obliged, in a great measure, to do the same. The parliament has therefore thought proper to establish a standing body of troops (amounting to about thirty thousand men), of which the king has the command.

But this army is only established for one year;

¹ A new sanction was given to the above restriction in the sixth article of the Bill of Rights: 'A standing army, without the consent of parliament, is against law.'

at the end of that term it is (unless re-established) to be *ipso facto* disbanded; and as the question, which then lies before parliament, is not whether the army *shall be dissolved*, but whether it shall be *established anew*, as if it had never existed, any one of the three branches of the legislature may, by its dissent, hinder its continuance.

Besides, the funds for the payment of these troops are to be paid by taxes that are not established for more than one year¹: and it becomes likewise necessary, at the end of this term, again to establish them². In a word, this instrument of defence, which the circumstances of modern times have caused to be judged necessary, being capable, on the other hand, of being applied to the most dangerous purposes, has been joined to the state by only a slender thread, the knot of which may be slipped, on the first appearance of danger³.

¹ The land-tax and malt-tax.

² It is also necessary that the parliament, when it renews the act against mutiny, should authorise the different courts-martial to punish military offences and desertion. It can therefore refuse the king even the necessary power of military discipline.

³ To these laws, or rather conventions, between king and people, I will add the oath which the king takes at his coronation; a compact which, if it cannot have the same precision as the laws above-mentioned, yet, in a manner, comprehends them all, and has the

But these laws, which limit the king's authority, would not, of themselves, have been sufficient. As they are, after all, only intellectual barriers, which the king might not at all times respect; as the check which the commons have on his proceedings, by a refusal of subsidies, farther advantage of being declared with more solemnity.

The archbishop or bishop shall say, 'Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes of parliament agreed on, and the laws and customs of the same?'
The king or queen shall say, 'I solemnly promise so to do.'

Archbishop or bishop. 'Will you, to your power, cause law and justice, in mercy, to be executed in all your judgments?' *King or queen, 'I will.'*

Archbishop or bishop. 'Will you, to the utmost of your power, maintain the laws of God, the true profession of the gospel, and the Protestant reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?' *King or queen, 'All this I promise to do.'*

After this, the king or queen, laying his or her hand upon the holy Gospels, shall say, 'The things which I have here before promised I will perform and keep: So help me, God!' and then shall kiss the book.

affects too much the whole state to be exerted on every particular abuse of his power ; and , lastly , as even this check might in some degree be eluded , either by breaking the promises which have procured subsidies , or by applying them to uses different from those for which they were appointed ; the constitution has , besides , supplied the commons with the means of immediate opposition to the misconduct of government , by giving them a right to impeach the ministers .

It is true , the king himself cannot be arraigned before judges ; because , if there were any that could pass sentence upon him , it would be they , and not he , who must finally possess the executive power : but , on the other hand , the king cannot act without ministers : it is therefore those ministers—that is , those indispensable instruments—whom they attack .

If , for example , the public money has been employed in a manner contrary to the declared intention of those who granted it , an impeachment may be brought against those who had the management of it . If any abuse of power is committed , or in general any thing done contrary to the public weal , they prosecute those who have been either the instruments or the advisers of the measure ¹ .

¹ It was upon these principles that the commons , in the beginning of the eighteenth century , impeached the earl of Orford , who had advised the treaty of

But who shall be the judges to decide in such a cause? What tribunal will flatter itself that it can give an impartial decision, when it shall see, appearing at its bar, the government itself as the accused, and the representatives of the people as the accusers?

It is before the house of peers that the law has directed the commons to carry their accusation; that is, before judges, whose dignity, on the one hand, renders them independent, and who, on the other, have a great honour to support in that awful function, where they have all the nation for spectators of their conduct.

When the impeachment is brought to the lords, they commonly order the person accused to be imprisoned. On the day appointed, the deputies of the house of commons, with the person impeached, make their appearance: the impeachment is read in his presence: counsels are allowed him, as well as time to prepare for his defence; and at the expiration of this term, the trial goes on from day to day, with open doors, and every thing is communicated in print to the public.

But whatever advantage the law grants to the person impeached for his justification, it is from the intrinsic merits of his conduct that he must draw his arguments and proofs. It would be of

partition, and the lord chancellor Somers, who had affixed the great seal to it.

no service to him, in order to justify a criminal conduct, to allege the commands of the sovereign; or pleading guilty with respect to the measures imputed to him, to produce the royal pardon¹. It is against the administration itself that the impeachment is carried on; it should therefore by no means interfere: the king can neither stop nor suspend its course, but is forced to behold, as an inactive spectator, the discovery of the share which he may himself have had in the illegal proceedings of his servants,

¹ This point, in ancient times, was far from being clearly settled. In the year 1678, the commons having impeached the earl of Danby, he pleaded the king's pardon in bar to that impeachment: great altercations ensued, which were terminated by the dissolution of that parliament. It was afterward enacted, (Stat. 12 and 13. VV. III. c. 2.) 'that no pardon under the great seal should be pleaded in bar to an impeachment by the house of commons.'

I once asked a gentleman, very learned in the laws of this country, if the king could remit the punishment of a man condemned in consequence of an impeachment of the house of commons? He answered me, 'The tories will tell you the king can, and the whigs, he cannot. But it is not perhaps very material that the question should be decided: the great public ends are attained when a corrupt minister is removed with disgrace, and the whole system of his proceedings unveiled to the public eye.'

and to hear his own sentence in the condemnation of his ministers.

An admirable expedient! which, by removing and punishing corrupt ministers, affords an immediate remedy for the evils of the state, and strongly marks out the bounds within which power ought to be confined: which takes away the scandal of guilt and authority united, and calms the people by a great and awful act of justice; an expedient, in this respect especially, so highly useful, that it is to the want of the like that Machiavel attributes the ruin of his republic.

But all these general precautions to secure the rights of the parliament, that is, those of the nation itself, against the efforts of the executive power, would be vain, if the members themselves remained personally exposed to them. Being unable openly to attack, with any safety to itself, the two legislative bodies, and by a forcible exertion of its prerogatives, to make, as it were, a general assault, the executive power might, by subdividing the same prerogatives, gain an entrance, and sometimes by interest, and at others by fear, guide the general will, by influencing that of individuals.

But the laws which so effectually provide for the safety of the people, provide no less for that of the members, whether of the house of peers, or that of the commons. There are not known in England either *commissaries*, who are always

ready to find those guilty whom the wantonness of ambition points out, or those secret imprisonments which are, in other countries, the usual expedients of government. As the forms and maxims of the courts of justice are strictly prescribed, and every individual has an inviolable right to be judged according to law, he may obey without fear the dictates of public virtue. Lastly, what crowns all these precautions is, its being a fundamental maxim, 'That the freedom of speech, and debates and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.'¹

The legislators, on the other hand, have not forgotten that interest, as well as fear, may impose silence on duty. To prevent its effects, it has been enacted, that all persons concerned in the management of any taxes created since 1692, commissioners of prize, navy, victualling-office, etc. controllers of the army accounts, agents for regiments, the clerks in the different offices of the revenue, persons holding any new office under the crown (created since 1705), or having a pension under the crown during pleasure, or for any term of years, are incapable of being elected members. Besides, if any member accepts an office under the crown, except it be an officer in the army or navy ac-

¹ Bill of Rights, Art. 9.

cepting a new commission, his seat becomes void, though such member is capable of being re-elected.

Such are the precautions hitherto taken by the legislators, for preventing the undue influence of the great prerogative of disposing of rewards and places—precautions which have been successively taken, according as circumstances have shewn them to be necessary : and which, we may thence suppose, are owing to causes powerful enough to produce the establishment of new ones, whenever circumstances shall point out the necessity of them ¹.

¹ Nothing can be a better proof of the efficacy of the causes that secure the liberty of the English, than those victories which the parliament from time to time gains over itself, and in which the members, forgetting all views of private ambition, only think of their interest as subjects.

Since this was first written, an excellent regulation has been made for the decision of controverted elections. Formerly the house decided them in a very summary manner, and the witnesses were not examined upon oath. But, by an act passed a few years ago, the decision is left to a jury, or committee, of fifteen members, formed in the following manner: Out of the members present, who must not be less than one hundred, forty-nine are drawn by lots : out of these, each candidate strikes off one alternately, till there remain only thirteen, who, with two others, named out of the whole house (one by each candidate), are

CHAP. IX.

Of private liberty, or the liberty of individuals.

WE have hitherto treated only of a general liberty, that is, of the rights of the nation as a nation, and of its share in the government. It now remains that we should treat particularly of a thing without which this general liberty, being absolutely frustrated in its object, would be only a matter of ostentation, and even could not long subsist—I mean the liberty of individuals.

Private liberty, according to the division of the English lawyers, consists, first, of the right of *property*, that is, of the right of enjoying exclusively the gifts of fortune, and all the various fruits of one's industry; secondly, of the right of *personal security*; thirdly, of the *loco-motive faculty*, taking the word liberty in its more confined sense.

Each of these rights, say again the English lawyers, is inherent in the person of every Englishman; they are to him as an inheritance, and he cannot be deprived of them, but by virtue of a sentence passed according to the laws of the land. And, indeed, as this right of

to form the committee. In order to secure the necessary number of a hundred members, all other business in the house is to be suspended till the above operations are completed.

inheritance is expressed in English by one word (*birth-right*), the same as that which expresses the king's title to the crown, it has, in times of oppression, been often opposed to him as a right, doubtless of less extent, but of a sanction equal to that of his own.

One of the principal effects of the right of property is, that the king can take from his subjects no part of what they possess : he must wait till they themselves grant it to him : and this right, which, as we have seen before, is, by its consequences, the bulwark that protects all the others, has moreover the immediate effect of preventing one of the chief causes of oppression.

In regard to the attempts to which the right of property might be exposed from one individual to another, I believe I shall have said every thing, when I have observed, that there is no man in England who can oppose the irresistible power of the laws ;—that, as the judges cannot be deprived of their employments but on an accusation by parliament, the effect of interest with the sovereign, or with those who approach his person, can scarcely influence their decisions ;—that, as the judges themselves have no power to pass sentence till the matter of fact has been settled by men nominated, we may almost say, at the common choice of the parties¹, all private

¹ From the extensive right of challenging jurymen,

views, and consequently all respect of persons, are banished from the courts of justice. However, that nothing may be wanting which may help to throw light on the subject I have undertaken to treat, I shall relate, in general, what is the law in civil matters, that has taken place in England.

When the Pandects were found at Amalphi, the clergy, who were then the only men that were able to understand them, did not neglect that opportunity of increasing the influence they had already obtained, and caused them to be received in the greater part of Europe. England, which was destined to have a constitution so different from that of other states, was to be farther distinguished by its rejecting the Roman laws.

Under William the Conqueror, and his immediate successors, a multitude of foreign ecclesiastics flocked to the court of England. Their influence over the mind of the sovereign, which, in the other states of Europe, as they were then constituted, might be considered as matter of little importance, was not so in a country, where the sovereign being all-powerful, to obtain influence over him was to obtain power itself. The English nobility saw, with the greatest jealousy, men, of condition so different from their own, which is allowed to every person brought to his trial, though not very frequently used.

vested with a power, to the attacks of which they were immediately exposed, and thought that they would carry that power to the height, if they should ever adopt a system of laws, which those same men sought to introduce, and of which they would necessarily become both the depositories and the interpreters.

It happened, therefore, by a somewhat singular conjunction of circumstances, that, to the Roman laws, brought over to England by monks, the idea of ecclesiastical power became associated, in the same manner as the idea of regal despotism was afterward annexed to the religion of the same monks, when favoured by kings who endeavoured to establish an arbitrary government. The nobility at all times rejected these laws, even with a degree of ill-humour¹; and the usurper Stephen, whose interest it was to conciliate their affections, went so far as to prohibit the study of them.

¹ The nobility, under the reign of Richard II. declared, in the French language of those times, 'Purce que le roialme d'Engleterre n'était devant ces heures, né à l'entent du roy notre seignior, et seigniors du parlement, unques ne sera,ulé ne gouverné par la loy civil;' viz. Inasmuch as the kingdom of England was not before this time, nor, according to the intent of the king our lord, and lords of parliament, ever shall be ruled or governed by the civil law. Parl. Westmonast. Feb. 3, 1379.

As the general disposition of things brought about a sufficient degree of intercourse between the nobility or gentry, and the people, the aversion to the Roman laws gradually spread itself far and wide; and those laws to which their wisdom, in many cases, and particularly their extensiveness, ought naturally to have procured admittance when the English laws themselves were yet but in their infancy, experienced the most steady opposition from the lawyers; and as those persons who sought to introduce them frequently renewed their attempts, there at length arose a kind of general combination among the laity, to confine them to universities and monasteries¹.

¹ It might perhaps be shewn, if it belonged to the subject, that the liberty of thinking in religious matters, which has at all times remarkably prevailed in England, is derived from nearly the same causes as its political liberty: both, perhaps, are owing to this, that the same men, whose interest it is in other countries that the people should be influenced by prejudices of a political or religious kind, have been in England forced to conform and unite with them. I shall here take occasion to observe, in answer to the reproach made to the English by president Henault, in his much-esteemed Chronological History of France, that the frequent changes of religion which have taken place in England do not argue any servile disposition in the people; they only prove the equilibrium between the then existing sects: there was

This opposition was carried so far, that Fortescue, chief justice of the King's Bench, and afterward chancellor under Henry VI. wrote a book entitled *De Laudibus Legum Angliæ*, in which he proposes to demonstrate the superiority of the English laws over the civil; and that nothing might be wanting in his arguments on that subject, he gives them the advantage of superior antiquity, and traces their origin to a period much anterior to the foundation of Rome.

This spirit has been preserved to much more modern times; and when we peruse the many paragraphs which judge Hale has written in his history of the common law, to prove that, in the few cases in which the civil law is admitted in England, it can have no power by virtue of any deference due to the orders of Justinian (a truth which certainly had no need of proof), we plainly see that this chief justice, who was also a very great lawyer, had, in this respect, retained somewhat of the heat of party.

Even at present, the English lawyers attribute the liberty they enjoy, and of which other nations are deprived, to their having rejected, while those nations have admitted, the Roman

none but what might become the prevailing one, whenever the sovereign thought proper to declare for it; and it was not England, as people may think at first sight—it was only its government which changed its religion.

law; which is mistaking the effect for the cause. It is not because the English have rejected the Roman laws that they are free; but it is because they were free (or at least because there existed, among them, causes which were, in process of time, to make them so), that they have been able to reject the Roman laws. But even though they had admitted those laws, these same circumstances, that have enabled them to reject the whole, would have likewise enabled them to reject those parts which might not have suited them; and they would have seen, that it is very possible to receive the decisions of the civil law on the subject of the *servitutes urbanæ et rusticæ*, without adopting its principles with respect to the power of the emperors¹.

Of this the republic of Holland, where the civil law is adopted, would afford a proof, if there were not the still more striking one of the emperor of Germany, who though, in the opinion of his people, he is the successor to the very throne of the *Cæsars*, has not, by a great deal, so much power as a king of England; and the reading of the several treaties which deprive him of the power of nominating the principal officers of the empire, sufficiently shews that a spirit of unlimited submission to monarchical

¹ What particularly frightens the English lawyers, is (L. i. Lib. I. Tit. 4. Dig.) *Quod principi placuerit legis habet vigorem*.

power is no necessary consequence of the admission of the Roman civil law.

The laws, therefore, that have taken place in England are what they call the *unwritten law* (also termed the *common law*), and the *statute law*.

The *unwritten law* is thus called, not because it is only transmitted by tradition from generation to generation, but because it is not founded on any known act of the legislature. It receives its force from immemorial custom, and, for the most part, derives its origin from acts of parliament enacted in the times which immediately followed the Conquest (particularly those anterior to the time of Richard the First), the originals of which are lost.

The principal objects settled by the common law, are the rules of descent, the different methods of acquiring property, the various forms required for rendering contracts valid; in all which points it differs more or less from the civil law. Thus, by the common law, lands descend to the eldest son, to the exclusion of all his brothers and sisters; whereas, by the civil law, they are equally divided among the children: by the common law, property is transferred by *writing*; but, by the civil law, *tradition* (or actual delivery) is moreover requisite, etc.

The source from which the decisions of the common law are drawn, is what is called *præ-*

teritorum memoria eventorum, and is found in the collection of judgments that have been passed from time immemorial, and which, as well as the proceedings relative to them, are carefully preserved under the title of *Records*. In order that the principles established by such a series of judgments may be known, extracts from them are, from time to time, published under the name of *Reports*; and these reports reach, by a regular series, so far back as the reign of Edward the Second inclusively.

Besides this collection, which is pretty voluminous, there are also some ancient writers of great authority among lawyers; such as Glanvil, who flourished in the reign of Henry the Second—Bracton, who wrote under Henry the Third—Fleta and Lyttleton. Among more modern authors, is sir Edward Coke, lord chief justice of the King's Bench under James the First, who has written four books of *Institutes*, and is at present the oracle of the common law.

The common law moreover comprehends some particular customs, which are fragments of the ancient Saxon laws, escaped from the disaster of the Conquest; such as that called *Gavel-kind*, in the county of Kent, by which lands are divided equally between or among the sons; and that called *Barrough English*, by which, in some districts, lands descend to the youngest son.

The civil law, in the few instances where it is admitted, is likewise comprehended under the

unwritten law, because it is of force only so far as it has been authorized by immemorial custom. Some of its principles are followed in the ecclesiastical courts, in the courts of admiralty, and in the courts of the two universities; but it is there nothing more than *lex sub lege graviore*; and these different courts must conform to acts of parliament, and to the sense given to them by the courts of common law, being moreover subjected to the control of the latter.

Lastly, the written law is the collection of the various acts of parliament, the originals of which are carefully preserved, especially since the reign of Edward the Third. Without entering into the distinctions made by lawyers with respect to them—such as *public* and *private* acts, *declaratory* acts, or such as are made to extend or restrain the common law, etc.—it will be sufficient to observe, that, being the result of the united wills of the three constituent parts of the legislature, they, in all cases, supersede both the common law and all former statutes, and the judges must take cognizance of them, and decide in conformity to them, even though they had not been alleged by the parties¹.

The different courts for the administration of justice in England, are,

I. The Court of Common Pleas. It formerly made a part of the *Aula Regis* (the king's hall

¹ Unless they be private acts.

or court); but as the latter was bound by its institution always to follow the person of the king, and private individuals experienced great difficulties in obtaining relief from a court that was ambulatory, and always in motion, it was made one of the articles of the Great Charter, that the Court of Common Pleas should thenceforward be holden in a fixed place¹; and since that time it has been seated at Westminster. It is composed of a lord chief justice, and three other judges; and appeals from its judgments, usually called *writs of error*, are brought before the Court of King's Bench.

II. The Court of Exchequer. It was originally established to determine those causes in which the king, or his servants, or accountants, were concerned, and has gradually become open to all persons. The confining the power of this court to the above class of persons is therefore now a mere fiction; only a man must, for form's sake, set forth in his declaration that he is debtor to the king, whether he be so or not. This court is composed of the chief baron of the exchequer, and three other judges.

III. The Court of King's Bench forms that part of the *Aula Regis* which continued to subsist after the dismembering of the Common Pleas. This court enjoys the most extensive

¹ "Communi placita non sequantur curiam nostram, sed teneantur in aliquo loco certo." Magna Charta, cap. 17.

authority of all other courts : it has the superintendence over all corporations, and keeps the various jurisdictions in the kingdom within their respective bounds. It takes cognizance, according to the end of its original institution, of all criminal causes, and even of many causes merely civil. It is composed of the lord chief justice and three other judges. Writs of error against the judgments passed in this court in civil matters are brought before the Court of the Exchequer Chamber ; or, in most cases, before the House of Peers.

IV. The Court of the Exchequer Chamber. When this court is formed by the four barons, or judges of the exchequer, together with the chancellor and treasurer of the same, it sits as a court of equity. When it is formed by the twelve judges, to whom sometimes the lord chancellor is joined, its office is to deliberate, when properly referred and applied to, and give an opinion on important and difficult causes, before judgments are passed upon them in those courts where the causes are depending.

CHAP. X.

On the law that is observed in England in regard to civil matters.

CONCERNING the manner in which justice is administered in England in civil matters, and

the kind of law that obtains in that respect, the following observations may be made :

The beginning of a civil process in England, or the first step usually taken in bringing an action, is the seizing, by public authority, the person against whom that action is brought. This is done with a view to secure each person's appearance before a judge, or at least make him give sureties for that purpose. In most of the countries of Europe, where the forms, introduced into the Roman civil law in the reigns of the later emperors, have been imitated, a different method has been adopted to procure a man's appearance before a court of justice. The usual practice is, to have the person sued, summoned to appear before the court, by a public officer belonging to it, a week beforehand : if no regard is paid to such summons twice repeated, the plaintiff (or his attorney) is admitted to make before the court a formal reading of his demand, which is then granted to him, and he may proceed to execution¹.

In this mode of proceeding, it is taken for granted, that a person who declines to appear

¹ A person against whom a judgment of this kind has been passed (which they call in France *un jugement par défaut*) may easily obtain relief : but as he now in his turn becomes in a manner the plaintiff, his deserting the cause, in this second stage of it, would leave him without remedy.

before a judge, to answer the demand of another, after being properly summoned, acknowledges the justice of such demand; and this supposition is very just and rational. However, the above-mentioned practice of securing beforehand the body of a person sued, though not so mild in its execution as that just now described, nor even more effectual, appears more obvious, and is more readily adopted, in those times when courts of law begin to be formed in a nation, and rules of distributive justice to be established; and it is very likely followed in England as a continuation of the methods that were adopted when the English laws were yet in their infancy.

In the times we mention, when laws begin to be formed in a country, the administration of justice between individuals is commonly lodged in the same hands which are intrusted with the public and military authority in the state. Judges, invested with a power of this kind, like to carry on their operations with a high hand: they consider the refusal of a man to appear before them, not as being barely an expedient to avoid doing that which is just, but as a contempt of their authority: they of course look upon themselves as being bound to vindicate it; and a writ of *capias* is speedily issued to apprehend the refractory defendant. A preliminary writ or order of this kind becomes in time the first regular step of a lawsuit; and

hence it seems to have happened, that, in the English courts of law, if I am rightly informed, a writ of *capias* is either issued before the *original* writ itself (which contains the summons of the plaintiff, and a formal delineation of his case), or is joined to such writ, by means of an *ac etiam capias*, and is served along with it.

In Rome, where the distribution of civil justice was at first lodged in the hands of the kings, and afterward of the consuls, the method of seizing the person of a man against whom a demand of any kind was preferred, previously to any judgment being passed against him, was likewise adopted and continued to be followed after the institution of the prætor's court, to whom the civil branch of the power of the consuls was afterward delegated; and it lasted to very late times : that is, to the times when those capital alterations were made in the Roman civil law, during the reigns of the later emperors, which gave it the form it now has in those codes or collections of which we are in possession.

A very singular degree of violence even took place in Rome, in the method used to secure the persons of those against whom a legal demand was preferred. In England, the way to seize a man under such circumstances, is by means of a public officer, supplied with a writ or order for that purpose, supposed to be directed to him (or to the sheriff his employer) from the king himself. But in Rome, every one became

a kind of public officer in his own cause, to assert the prætor's prerogative; and, without any ostensible legal licence or badge of public authority, had a right to seize by force the person of his opponent wherever he met him. The practice was, that the plaintiff first summoned the person sued, with a loud voice, to follow him before the court of the prætor¹. When the defendant refused to obey such summons, the plaintiff, by means of the words *licet antestari*? requested the by-standers to be witnesses of the fact; as a remembrance of which, he touched the ears of each of them; and then proceeded to seize his opponent, by throwing his arms round his neck (*obtorto collo*), thus endeavouring to drag him before the prætor. When the person sued was, through age or sickness, disabled from following the plaintiff, the latter was directed by the law of the twelve tables to supply him with a horse (*jumentum dato*).

The above method of proceeding was however in after times mitigated, though very late and slowly. In the first place, it became unlawful to seize a man in his own house, as it was the abode of his domestic gods. Women of good family were in time protected from the severity of the above custom, and they could no longer be dragged by force before the tribunal of the præ-

¹ *Ad tribunal sequere, in jus ambula.*

tor. The method of placing a sick or aged person by force upon a horse seems to have been abolished during the later times of the republic. Emancipated sons, and freed slaves, were afterward restrained from summoning their parents, or late masters, without having expressly obtained the prætor's leave, under the penalty of fifty pieces of gold. However, so late as the time of Pliny, the old mode of summoning, or carrying by force before a judge, continued in general to subsist; though, in the time of Ulpian, the necessity of expressly obtaining the prætor's leave was extended to all cases and persons; and in Constantine's reign, the method began to be established of having the legal summons served only by means of a public officer appointed for that purpose. After that time, other changes in the former law were introduced, from which the mode of proceeding now used on the continent of Europe has been borrowed.

In England, likewise, some changes, we may observe, have been wrought in the law and practice concerning the arrests of sued persons, though as slowly and late as those effected in the Roman republic or empire, if not more so; which evinces the great impediments of various kinds that obstruct the improvement of laws in every nation. So late as the reign of king George the First, an act was passed to prohibit the practice of previous personal arrest, in cases of demands under two pounds sterling; and since

that time, those courts, justly called *of Conscience*, have been established, in which such demands are to be summarily decided, and simple summons, without arrest, can only be used. A bill was afterward enacted¹ (on the motion of lord Beaucham, whose name deserves to be recorded), by which the prohibition of arrest was extended to all cases of debt under ten pounds sterling—a bill, the passing of which was of twenty, or even a hundred times more real importance, than the rise or fall of a favourite, or a minister, though it has, perhaps been honoured with a less degree of attention by the public.

Other peculiarities of the English civil law are the great refinements, formalities, and strictness, that prevail in it. Concerning such refinements, which are rather imperfections, the same observation may be made that has been introduced above, in regard to the mode and frequency of civil arrest in England; which is, that they are continuations of methods adopted when the English law began to be formed, and are the consequences of the situation in which the English placed themselves when they rejected the ready-made code of the Roman civil law, and rather chose to become their own law-makers, and raise from the ground the structure of their own national civil code, which code, it may be

¹ In 1779.

observed, is as yet in the first stage of its formation, as the Roman law itself was during the times of the republic, and in the reigns of the first emperors.

The time at which the power of administering justice to individuals becomes separated from the military power (an event which happens sooner or later in different countries), is the real era of the origin of a regular system of laws in a nation. Judges being now deprived of the power of the sword (or which amounts to the same), being obliged to borrow that power from other persons, endeavour to find their resources within their own courts, and, if possible, to obtain submission to their decrees from the great regularity of their proceedings, and the reputation of the impartiality of their decisions. At the same time, also, lawyers begin to crowd in numbers to courts, which it is no longer dangerous to approach, and add their refinements to the rules already set down either by the legislature or the judges. As the employing of them, especially in the beginning, is matter of choice and they fear, that, if bare common sense were thought sufficient to conduct a lawsuit, every body might imagine he knows as much as they do, they contrive difficulties to make their assistance needful. As the true science of the law, which is no other than the knowledge of a long series of former rules and precedents, cannot as yet exist, they endeavour to create an

artificial one to recommend themselves by. Formal distinctions and definitions are invented to express the different kinds of claims that men may set up against one another; in which almost the same nicety is displayed as that used by philosophers in classing the different subjects, or *kingdoms*, of natural history. Settled forms of words, under the name of *writs*, or the like, are devised to set forth those claims; and, like introductory passes, serve to usher claimants into the temple of Justice. For fear their clients should desert them after their first introduction, like a sick man who rests contented with a single visit of the physician, lawyers contrive other ceremonies, and technical forms, for the farther conduct of the process and the *pleadings*; and in order still more safely to bind their clients to their dominion, they at length make every error relating to their professional regulations, whether it be a *misnomer*, a *mispleading*, or the like transgression, to be of as fatal a consequence as a failure against the laws of strict justice. Upon the foundation of the above-mentioned definitions and metaphysical distinctions of cases and actions, a number of strict rules of law are moreover raised, with which none can be acquainted but such as are complete masters of those distinctions and definitions.

To a person who, in a posterior age, observes for the first time such refinements in the distribution of justice, they appear very strange,

and even ridiculous. Yet it must be confessed, that during the times of the first institution of magistracies and courts of a civil nature, ceremonies and formalities, of different kinds, are very useful to procure to such courts, both the confidence of those persons who are brought before them, and the respect of the public at large; and they thereby become actual substitutes for military force, which till then, had been the chief support of judges. Those same forms and professional regulations are moreover useful to give uniformity to the proceedings of the lawyers and of the courts of law, and to ensure constancy and steadiness to the rules which they set down among themselves. And if the whole system of the refinements we mention continue to subsist in very remote ages, it is in a great measure owing (not to mention other causes) to their having so coalesced with the essential parts of the law as to make danger, or at least great difficulties, be apprehended from a separation: and they may, in that respect, be compared with a scaffolding used in the raising of a house, which, though only intended to set the materials and support the builders, happens to be suffered for a long time afterward to stand, because it is thought the removal of it might endanger the building.

Very singular law formalities and refined practices, of the kind here alluded to, had been contrived by the first jurisconsults in

Rome, with a view to amplify the rules set down in the laws of the Twelve Tables; which being few, and engraven on brass, every body could know as well as they : it even was a general custom to give those laws to children to learn, as we are informed by Cicero.

Very accurate definitions, as well as distinct branches of cases and actions, were contrived by the first Roman jurisconsults; and when a man had once made his election of that peculiar kind of *action* by which he chose to pursue his claim, it became out of his power to alter it. Settled forms of words, called *actiones legis*, were moreover contrived, which men must absolutely use to set forth their demands. The party himself was to recite the appointed words before the prætor; and should he unfortunately happen to miss or add a single word, so as to seem to alter his real case or demand, he lost his suit thereby. To this an allusion is made by Cicero, when he says, ‘ We have a civil law so constituted, that a man becomes nonsuited, who has not proceeded in the manner he should have done.’¹ An observation of the like nature is also to be found in Quintilian, whose expressions on the subject are as follow :—‘ There is, besides, another danger; for if but one word

¹ ‘ Ita jus civile habemus constitutum, ut causâ cadat is qui non quemadmodum oportet egerit.’ De Invent. II. 19.

has been mistaken, we are to be considered as having failed in every point of our suit.' ¹ Similar solemnities, and appropriated forms of words, were moreover necessary to introduce the reciprocal answers and replies of the parties, to require and accept securities, to produce witnesses, etc.

Of the above *actiones legis* the Roman jurisconsults and pontiffs had carefully kept the exclusive knowledge to themselves, as well as of those days on which religion did not allow courts of law to sit ². Cn. Flavius, secretary to Appius Claudius, having happened to divulge the secret of those momentous forms (an act for which he was afterward preferred by the people), jurisconsults contrived fresh ones, which they began to keep written with secret ciphers; but a member of their own body again betrayed them, and the new collection which he published was called *Jus Ælianum* from his name (Sex. Ælius), in the same manner as the former collection had been called *Jus Flavianum*. However, it does not seem that the influence of lawyers became much abridged by those two collections: besides written information of that sort, practice is also necessary; and the public

¹ 'Est etiam periculosum, quum, si uno verbo sit erratum, totâ causâ cecidisse videamur.' Inst. Orat. VII. 3.

² *Dies fasti et nefasti.*

collections we mention, like the many books that have been published on the English law, could hardly enable a man to become a lawyer, at least sufficiently so as to conduct a lawsuit.

Modern civilians have been at uncommon pains to find out and produce the ancient *formulae* we mention; in which they really have had great success. Old comic writers, such as Plautus and Terence, have supplied them with several: the settled words, for instance, used to claim the property of a slave, frequently occur in their works¹.

¹ The words addressed to the plaintiff, by the person sued, when the latter made his appearance on the day for which he had been compelled to give sureties, were as follow, and are alluded to by Plaut. *Curcul.* l. 3. v. 5. 'Where art thou who hast obliged me to give sureties? Where art thou who summonedst me? Here I stand before thee: do thyself stand before me.' To which the plaintiff made answer, 'Here I am.' The defendant replied, 'What dost thou say?' The plaintiff answered, 'I say (*Aio*)' and then followed the form of words by which he chose to express his action. *Ubi tu es, qui me vadatus es? Ubi tu es, qui me citasti? Ecce ego me tibi sisto; tu contra et te mihi siste*, etc.

If the action, for instance, was brought on account of goods stolen, the settled penalty (or damages) for which was the restitution of twice the value, the words to be used were, *AIO decem aureos mihi furto tuo abesse, teque eo nomine viginti aureos mihi dare oportere*. For work done, such as clea-

Extremely like the above *actiones legis* are the *writs* used in the English courts of law. Those writs are framed for, and adapted to, every branch or denomination of actions, such

ning of clothes, etc.: *AIO te mihi tritici modium, de quo inter nos convenit ob polita vestimenta tua, dare oportere*. For recovering the value of a slave killed by another citizen: *AIO te hominem meum occidisse, teque mihi quantum ille hoc anno plurimi fuit dare oportere*. For damages done by a vicious animal: *AIO bovem Mævii servum meum, Stichum, cornu petiisse et occidisse, eoque nomine Mævium, aut servi æstimationem præstare, aut bovem mihi noxæ dare, oportere*;—or, *AIO ursum Mævii mihi vulnus intulisse, et Mævium quantum æquius melius mihi dare oportere*, etc.

It may be observed, that the particular kind of remedy which was provided by the law for the case before the court was expressly pointed out in the formula used by a plaintiff, and in regard to this no mistake was to be made.—Thus, in the last-quoted formula, the words *quantum æquius melius*, shew that the prætor was to appoint inferior judges, both to ascertain the damage done, and determine finally upon the case, according to the direction he previously gave them; these words being exclusively appropriated to the kind of actions called *arbitrarie*, from the above-mentioned judges or arbitrators. In actions brought to require the execution of conventions that had no name, the convention itself was expressed in the formula: such is that which is recited above, relating to work done by the plaintiff, etc.

as *detinue*, *trespass*, *action upon the case*, *accompt*, and *covenant*, etc.; the same strictness obtains in regard to them as did in regard to the Roman *formulae* above mentioned: there is the same danger in misapplying them, or in falling in any part of them: and to use the words of an English law-writer on the subject, ‘Writs must be rightly directed, or they will be nought.—In all writs, care must be had that they be laid and formed according to their case, and so pursued in the process thereof.’

The same formality likewise prevails in the English *pleadings* and conduct of the process as obtained in the old Roman law proceedings; and in the same manner as the Roman juriconsults had their *actionis postulationes et editiones*, their *inficiationes*, *exceptiones*, *sponsiones*, *replicationes*, *duplicationes*, etc.; so the English lawyers have their *counts*, *bars*, *replications*, *rejoinders*, *surrejoinders*, *rebutters*, *sur-rebutters*, etc. A scrupulous accuracy in observing certain rules is moreover necessary in the management of those pleadings: the following are the words of an English law-writer on the subject: ‘Though the art of pleading was in its nature and design only to render the fact plain and intelligible, and to bring the matter to judgment with convenient certainty, it began to degenerate from its primitive simplicity.

¹ Jacob’s Law Dictionary. See *Writ*.

Pleaders, yea, and judges, having become too curious in that respect, pleadings at length ended in a piece of nicety and curiosity, by which the miscarriage of many a cause, upon small trivial objections, has been occasioned. ' 1

There is, however, a difference between the Roman *actiones legis* and the English writs; which is, that the former might be framed, when new ones were necessary, by the prætor or judge of the court, or, in some cases, by the body of the jurisconsults themselves,—whereas *writs*, when wanted for such new cases as may offer, can only be devised by a distinct judge, or court, exclusively invested with such powers, viz. the High Court of Chancery. The issuing of writs already existing, for the different cases to which they belong, is also expressly reserved to this court; and so important has its office on those two points been deemed by lawyers, that it has been called, by way of eminence, the manufactory of justice (*officina justitiæ*). Original writs, besides, when once framed, are not at any time to be altered, except by parliamentary authority ².

¹ Cunningham's Law Dictionary. See *Pleadings*.

² Writs, legally issued, are also necessary for executing the different incidental proceedings that may take place in the course of a law-suit, such as producing witnesses, etc. The names given to the different kinds of writs are usually derived from the

Of so much weight in the English law are these original delineations of cases, that no cause is suffered to be proceeded upon, unless they first appear as legal introductors to it. However important or interesting the case, the judge, till he sees the writ he is used to, or at least a writ issued from the right manufactory, is both deaf and dumb. He is without eyes to see, or ears to hear. And when a case of a new kind offers, for which there is yet no writ in being, should the lord chancellor and masters in chancery disagree in creating one, or prove unequal to the arduous task, the great national council, that is, parliament itself, is, in such emergency, expressly applied to : by means of its collected wisdom, the right mystical words are brought together; the judge is restored to the free use of his organs

first Latin words by which they began when they were written in Latin, or at least from some remarkable word in them, which gives rise to expressions sufficiently uncouth and unintelligible. Thus, a *pone* is a writ issued to oblige a person in certain cases to give sureties (*pone per vadium* and *salvos plegios*). A writ of *subpœna* is to oblige witnesses, and sometimes other classes of persons, to appear before a court. An action of *qui tam* is that which is brought to sue for a proportional share of a fine established by some penal statute, by the person who laid an information; the words in the writ being, *Qui tam pro domino rege, quam pro seipso in hac parte sequitur*, etc.

of hearing and of speech ; and, by the creation of a new *writ*, a new province is added to the empire of the courts of law.

In fine, those precious writs, those valuable briefs (*brevia*) as they are also called by way of eminence, which are the elixir and quintessence of the law, have been committed to the special care of officers appointed for that purpose, whose offices derive their names from the peculiar instruments they respectively use for the preservation of the deposit with which they are intrusted : the one being called the office of the *Hamper*, and the other, of the *Small Bag* ¹.

To say the truth, however, the creating of a new writ, upon any new given case, is matter of greater difficulty than the generality of readers are aware of. The very importance which is thought to be in those professional forms of words, renders them really important. As every thing without them is illegal in a court of common law, so with them every thing becomes legal ; that is to say, they empower the court legally to determine upon every kind of suit to

¹ *Hanaperium et parva Baga*, the Hamper Office, and the Petty-Bag Office. The first and last of these Latin words, it may be observed, do not occur in Tully's works. To the care of the Petty-Bag Office those writs are trusted in which the king's business is concerned ; and to the Hamper Office, those which relate to the subject.

which they are made to serve as introducers. The creating of a new writ, therefore, amounts, in its consequences, to the framing of a new law, and a law of a general nature too : now, the creating of such a law, on the first appearance of a new case, which law is afterward to be applied to all such cases as may be similar to the first, is really matter of difficulty ; especially when men are yet in the dark as to the best kind of provision to be made for the case in question, or even when it is not, perhaps, yet known whether it be proper to make provision at all. The framing of a new writ, under such circumstances, is a measure on which lawyers or judges will not very willingly either venture of themselves, or apply to the legislature for that purpose.

From the above-mentioned real difficulty in creating new writs on one hand, and the absolute necessity of such writs in the courts of common law on the other, many new species of claims and cases (the arising of which is, from time to time, the unavoidable consequence of the progress of trade and civilization) are left unprovided for, and remain like so many vacant spaces in the law, or rather like so many inaccessible spots, which the laws in being cannot reach : now this is a great imperfection in the distribution of justice which should be open to every individual, and provide remedies for every kind of claim which men may set up against each other.

To remedy the above inconvenience, or rather in some degree to palliate it, law fictions have been resorted to, in the English law, by which writs, being warped from their actual meaning, are made to extend to cases to which they in no shape belong.

Law fictions of the kind we mention were not unknown to the old Roman jurisconsults; and as an instance of their ingenuity in that respect may be mentioned that kind of action in which a daughter was called a son¹. Several instances might also be quoted of the fictitious use of writs in the English courts of common law. A very remarkable expedient of that sort occurs in the method generally used to sue for the payment of certain kinds of debt before the Court of Common Pleas; such (if I mistake not) as a salary for work done, indemnity for fulfilling orders received, etc. The writ issued in these cases is grounded on the supposition, that the person sued has trespassed on the ground of the plaintiff, and broken, by force of arms, through his fences and inclosures; and, under this predicament, the defendant is brought before the

¹ From the above instance it might be concluded that the Roman jurisconsults possessed still greater power than the English parliament; for it is a fundamental principle with the English lawyers, that parliament can do every thing, *except* making a woman a man, or a man a woman.

court : this species of writ, which lawyers have found of most convenient use, to introduce before a court of common law the kinds of claim we mention, is called, in technical language, a *clausum fregit*. In order to bring a person before the Court of King's Bench, to answer demands of much the same nature with those above, a writ, called a *latitat*, is issued, in which it is taken for granted that the defendant insidiously conceals himself, and is lurking in some county different from that in which the court is sitting; the expressions used in the writ being, 'that he runs up and down and secretes himself;' though no such fact is seriously meant to be advanced either by the attorney or the party.

The same principle of strict adherence to certain forms, long since established, has also caused lawyers to introduce into their proceedings fictitious names of persons, who are supposed to discharge the office of sureties; and in certain cases, it seems, the name of a fictitious person is introduced in a writ with that of the principal defendant, as being joined in a common cause with him. Another instance of the same high regard of lawyers, and judges too, for certain old forms, which makes them more unwilling to depart from such forms than from the truth itself of facts, occurs in the above-mentioned expedient used to bring ordinary causes before the Court of Exchequer, in order to be tried there at common law; which is, by

making a declaration that the plaintiff is a king's debtor, though neither the court, nor the plaintiff's attorney, lay any serious stress on the assertion.

CHAP. XI.

The subject continued. The courts of equity.

HOWEVER, there are limits to these fictions and subtilties ; and the remedies of the law cannot by their means be extended to all cases that may arise, unless too many absurdities are suffered to be accumulated ; nay, there have been instances in which the improper application of writs, in the courts of law, has been checked by authority. In order, therefore, to remedy the inconveniences we mention—that is, in order to extend the administration of distributive justice to all possible cases, by freeing it from the professional difficulties that have gradually grown up in its way—a new kind of courts has been instituted in England, called *Courts of Equity*.

The generality of people, misled by the word *equity*, have conceived false notions of the office of these courts ; and it seems to be generally thought, that the judges who sit in them are only to follow the rules of natural equity ; by which people seem to understand, that, in a court of equity, the judge may follow the dic-

tates of his own private feelings, and ground his decisions, as he thinks proper, on the peculiar circumstances and situation of those persons who make their appearance before him. Nay, doctor Johnson (in his abridged dictionary) gives the following definition of the power of the Court of Chancery, considered as a court of equity: 'The chancellor hath power to moderate and temper the written law, and subjecteth himself only to the law of nature and conscience:' for which definition, Dean Swift, and Cowell, who was a lawyer, are quoted as authorities. Other instances might be produced of lawyers who have been inaccurate in their definitions of the true offices of the judges of equity. And the above-named doctor himself is on no subject a despicable authority.

Certainly the power of the judges of equity cannot be to alter, by their own private power, the written law, that is, acts of parliament, and thus to control the legislature. Their office only consists, as will be proved in the sequel, in providing remedies for those cases for which the public good requires that remedies should be provided, and in regard to which the courts of common law, shackled by their original forms and institutions, cannot procure any:—or, in other words, the courts of equity have a power to administer justice to individuals, unrestrained (not by the law) but by the professional law-difficulties, which lawyers have from time

to time contrived in the courts of common law, and to which the judges of those courts have given their sanction.

An office of the kind here mentioned was soon found necessary in Rome, for reasons of the same nature with those above delineated; for, it is remarkable enough, that the body of English lawyers, by refusing admittance to the code of Roman laws, as it existed in the later times of the empire, have only subjected themselves to the same difficulties under which the old Roman jurisconsults laboured, during the time they were raising the structure of those same laws. And it may also be observed, that the English lawyers, or judges have fallen upon much the same expedients as those which the Roman jurisconsults and prætors had adopted.

This office of a judge of *equity* was, in time, assumed by the prætor in Rome, in addition to the judicial power he before possessed¹. At the beginning of the year for which he had been elected, the prætor made a declaration of those remedies for new difficult cases, which he had determined to afford during the time of his magistracy; in the choice of which he was no doubt directed, either by his own observations (while

¹ The prætor thus possessed two distinct branches of judicial authority, in the same manner as the Court of Exchequer does in England, which occasionally sits as a court of common law, and a court of equity.

out of office) on the propriety of such remedies, or by the suggestions of experienced lawyers on the subject. This declaration (*edictum*) the prætor produced *in albo*, as the expression was. Modern civilians have made many conjectures on the real meaning of the above words : one of their suppositions, which is as likely to be true as any other, is, that the heads of new law-remedies, devised by the prætor, were written on a whitened wall by the side of his tribunal.

Among the provisions made by the Roman prætors in their capacity of judges of equity, may be mentioned those which they introduced in favour of emancipated sons, and of relatives by the women's side (*cognati*), in regard to the right of inheriting. Emancipated sons were supposed, by the laws of the Twelve Tables, to have ceased to be the children of their father, and, as a consequence, a legal claim was denied them on the paternal inheritance : of the relatives by the women's side no notice was taken in that article of the same laws which treated of the right of succession, mention being only made of relatives by the men's side (*agnati*). The former the prætor admitted, by the edict *unde liberi*, to share their father's (or grandfather's) inheritance with their brothers ; and the latter he put in possession of the patrimony of a kinsman deceased, by means of the edict *unde cognati*, when there were no relatives by the men's side. These two kinds of

inheritance were not, however, called *hæreditas*, but only *bonorum possessio*; these words being very accurately distinguished, though the effect was in the issue exactly the same.

In the same manner, the laws of the Twelve Tables had provided relief only for cases of theft; and no mention was made in them of cases of goods taken away by force (a deed which was not looked upon in so odious a light at Rome as theft, which was considered as the peculiar guilt of slaves). In process of time, the prætor promised relief to such persons as might have their goods taken from them by open force, and gave them an action for the recovery of four times the value, against those who had committed the fact with an evil intention. *Si cui dolo malo bona rapta esse dicentur, ei in quadruplum JUDICIUM DABO.*

Again, neither the laws of the Twelve Tables, nor the laws made afterward in the assemblies of the people, had provided remedies, except for very few cases of fraud. Here the prætor likewise interfered in his capacity of judge of equity, though so very late as the time of Cicero, and promised relief to defrauded persons, in those cases in which the laws in being afforded no action. *Quæ dolo malo facta esse dicentur, si de his rebus alia actio non erit, et justa causa esse videbitur, JUDICIUM DABO*¹. By edicts

¹ At the same time that the prætor proffered a new

of the same nature, prætors in process of time gave relief in certain cases to married women, and likewise to minors (*minoribus xxv annis succurrit prætor*, etc. ¹).

edict, he also made public those peculiar formulæ by which the execution of the same was afterward to be required from him. The name of that prætor who first produced the edict above mentioned was Aquilius, as we are informed by Cicero, in that elegant story well known to scholars, in which he relates the kind of fraud that was put upon Canius, a Roman knight, when he purchased a pleasure-house and gardens, near Syracuse in Sicily. This account Cicero concludes with observing, that Canius was left without remedy, 'as Aquilius, his colleague and friend, had not yet published his formulæ concerning fraud.'—*Quid enim faceret? nondum enim Aquilius, collega et familiaris meus, protulerat de dolo malo formulas.* Off. III. 14.

¹ The law collection, or system, that was formed by the series of edicts published at different times by prætors, was called *jus prætorium*, and also *jus honorarium* (*not strictly binding*). The laws of the Twelve Tables, together with all such other laws as had at any time been passed in the assembly of the people, were called, by way of eminence, *jus civile*. The distinction was exactly of the same nature as that which takes place in England between the common and statute laws, and the law or practice of the courts of equity. The two branches of the prætor's judicial office were very accurately distinguished; and there was, besides, this capital difference between the

The courts of equity established in England have, in like manner, provided remedies for a very great number of cases, or species of demand, for which the courts of common law, cramped by their forms and peculiar law tenets, can afford none. Thus the courts of equity may, in certain cases, give actions for and against infants, notwithstanding their minority—and for and against married women, notwithstanding their coverture. Married women may even, in certain cases, sue their husbands before a court of equity. Executors may be made to pay interest for money that lies long in their hands. Courts of equity may appoint commissioners to hear the evidence of absent witnesses. When other proofs fail, they may impose an oath on either of the parties; or, in the like case of a failure of proofs, they may compel a trader to produce his books of trade. They may also confirm a title to land, though one has lost his writings, etc.

The power of the courts of equity in England, of which the Court of Chancery is the principal one, no doubt owes its origin to the power possessed by the latter, both of creating and issuing remedies or actions which he gave in his capacity of judge of civil law, and those in his capacity of judge of equity, that the former, being grounded on the *jus civile*, were perpetual, and were called *actiones civiles*, or *actiones perpetuæ*; the latter were obliged to be preferred within the year, and were accordingly called *actiones annuæ*, or *actiones prætoriæ*.

writs. When new complicated cases offered, for which a new kind of writ was wanted, the judges of Chancery, finding that it was necessary that justice should be done, and at the same time being unwilling to make general and perpetual provisions on the cases before them, by creating new writs, commanded the appearance of both parties, in order to procure as complete information as possible in regard to the circumstances attending the case; and then they gave a decree upon the same by way of experiment.

To beginnings and circumstances like these, the English courts of Equity, it is not to be doubted, owe their present existence. In our days, when such strict notions are entertained concerning the power of magistrates and judges, it can scarcely be supposed that those courts, however useful, could gain admittance. Nor, indeed, even in the times when they were instituted, were their proceedings free from opposition; and afterward, so late as the reign of queen Elisabeth, it was adjudged, in the case of *Colleston* and *Gardner*, that the killing a sequestrator from the Court of Chancery, in the discharge of his business, was no murder; which judgment could only be awarded on the ground that the sequestrator's commission, and consequently the power of his employers, were illegal¹. However, the authority of the courts of

¹ When sir Edward Coke was lord chief justice of

equity has, in process of time, become settled; one of the constituent branches of the legislature even receives at present appeals from the decrees passed in those courts; and I have no doubt that several acts of the whole legislature might be produced, in which the office of the courts of equity is openly acknowledged.

The kind of process that has in time been established in the Court of Chancery is as follows: after a petition is received by the court, the person sued is served with a writ of *subpœna*, to command his appearance. If he does not appear, an attachment is issued against him; if a *non-inventus* is returned, that is, if he is not to be found, a proclamation goes forth against him; then a commission of rebellion is issued for apprehending him, and bringing him to the Fleet prison. If the person sued stands farther in contempt, a serjeant at arms is to be sent out to take him; and, if he cannot be taken, a sequestration of his land may be obtained till he appears. Such is the power which the Court of Chancery, as a court of equity, hath gradually

the King's Bench, and lord Ellesmere lord chancellor, during the reign of James I. a very serious quarrel also took place between the courts of law and those of equity, which is mentioned in the fourth chapter of the third book of Judge Blackstone's Commentaries: a work in which more might reasonably have been said on the subject of the courts of equity.

acquired to compel appearance before it. In regard to the execution of the decrees it gives, it seems that court has not been quite so successful; at least, those law-writers whose works I have had an opportunity of seeing, hold it as a maxim, that the Court of Chancery cannot bind the estate, but only the person; and, as a consequence, a person who refuses to submit to its decree, is only to be confined in the Fleet prison¹.

On this occasion I shall observe, that the authority of the lord chancellor in England, in his capacity of a judge of equity, is much more narrowly limited than that which the prætors in Rome had been able to assume.—The Roman prætors, we are to remark, united in themselves the double office of deciding cases according to the civil law (*jus civile*), and to the prætorian law, or law of equity; nor did there exist any

¹ The Court of Chancery was, very likely, the first instituted of the two courts of equity: as it was the highest court in the kingdom, it was best able to begin the establishment of an office or power, which naturally gave rise at first to so many objections. The Court of Exchequer, we may suppose, only followed the example of the Court of Chancery: in order the better to secure the new power it assumed, it even found it necessary to bring out the whole strength it could muster; and both the treasurer and the chancellor of the Exchequer sit (or are supposed to sit) in the Court of Exchequer, when it is formed as a Court of equity.

other court besides their own, that might serve as a check upon them : hence it happened, that their proceedings in the career of equity were very arbitrary. In the first place, they did not use to make it any very strict rule to adhere to the tenor of their own edicts, during the whole year which their office lasted : and they assumed a power of altering them as they thought proper. To remedy so capital a defect in the distribution of justice, a law was passed so late as the year of Rome 687 (not long before Tully's time) which was called *Lex Cornelia*, from the name of C. Cornelius, a tribune of the people, who propounded it under the consulship of C. Piso and Man. Glabrio. By this law it was enacted, that prætors should, in future, constantly decree according to their own edicts, without altering any thing in them during the whole year of their prætorship. Some modern civilians produce a certain senatus-consult to the same effect, which, they say, had been passed a hundred years before ; while others are of opinion that the same is not genuine : however, supposing it to be really so, the passing of the law we mention shews that it had not been so well attended to as it ought to have been.

Though the above-mentioned arbitrary proceedings of prætors were thus repressed, they retained another privilege, equally hurtful ; which was, that every new prætor, on his coming into office, had it in his power to retain

only what part he pleased of the edicts of his predecessors, and to reject the remainder: from which it followed, that the prætorian laws, or edicts, though provided for so great a number of important cases, were really in force for only one year, the time of the duration of a prætor's office. Nor was a regulation made to remedy this capital defect in the Roman jurisprudence before the time of the emperor Hadrian, which is another remarkable proof of the very great slowness with which useful public regulations take place in any nation. Under the reign of the emperor we mention, the most useful edicts of former prætors were, by his order, collected, or rather compiled, into one general edict, which was thenceforward to be observed by all civil judges in their decisions, and was accordingly called the perpetual edict (*perpetuum edictum*). This edict, though now lost, soon grew into great repute; all the jurisconsults of those days vied with each other in writing commentaries upon it; and the emperor himself thought it so glorious an act of his reign, to have caused the same to be framed, that he considered himself on that account as being another Numa¹.

¹ Several other more extensive law-compilations were framed after the perpetual edict we mention; there having been a kind of emulation among the Roman emperors, in regard to the improvement of the law. At last, under the reign of Justinian, that

But the courts of equity in England, notwithstanding the extensive jurisdiction they have been able, in process of time, to assume, never superseded the other courts of law. These courts still continue to exist in the same manner as formerly, and have proved a lasting check on the innovations, and, in general, the proceedings of the courts of equity. And here we may remark the singular, and, at the same time, effectual, means of balancing each other's influence, reciprocally possessed by the courts of the two different species. By means of its exclusive privilege, both of creating and issuing writs, the Court of Chancery has been able to hinder the courts of common law from arrogating to themselves the cognizance of those new cases which were not provided for by any law in being, and thus dangerously uniting in themselves the

celebrated compilation was published, called the Code of Justinian, which, under different titles, comprises the Roman laws and the edicts of the prætors, together with the *rescripts* of the emperors, and an equal sanction was given to the whole. This was an event of much the same nature as that which will take place in England, whenever a coalition shall be effected between the courts of common law and those of equity; and both shall thenceforward be bound alike to frame their judgments from the whole mass of decided cases and precedents then existing, at least such of it as may be consistently brought together into one compilation.

power of judges of equity with that of judges of common law. On the other hand, the courts of common law are alone invested with the power of punishing (or allowing damages for) those cases of violence by which the proceedings of the courts of equity might be opposed; and thus they have been enabled to obstruct the enterprises of the latter, and prevent their effecting in themselves the like dangerous union of the two offices of judges of common law and of equity.

From the situation of the English courts of equity, with respect to the courts of common law, those courts have really been kept within limits that may be said to be exactly defined, if the nature of their functions be considered. In the first place, they can neither touch acts of parliament, nor the established practice of the other courts, much less reverse the judgments already passed in these latter, as the Roman prætors sometimes used to do in regard to the decisions of their predecessors in office, and sometimes also in regard to their own. The courts of equity are even restrained from taking cognizance of any case for which the other courts can possibly afford remedies: nay, so strenuously have the courts of common law defended the verge of their frontier that they have prevented the courts of equity from using, in their proceedings, the mode of trial by a jury; so that when, in a case of which the Court of Chancery has already begun to take cognizance, the parties happen to

join issue on any particular fact (the truth or falsehood of which a jury is to determine), the Court of Chancery is obliged to deliver up the cause to the Court of King's Bench, there to be finally decided. In fine, the example of the regularity of the proceedings, practised in the courts of common law, has been communicated to the courts of equity; and rolls or records are carefully kept of the pleadings, determinations, and acts of these courts, to serve as rules for future decisions¹.

So far, therefore, from having it in his power '*to temper and moderate*' (that is, *to alter*) the written law or statutes, a judge of equity, we find, cannot alter the unwritten law, that is to say, the established practice of the other courts, and the judgments grounded thereupon; nor can he even meddle with those cases for which either the written or unwritten law has already made general provisions, and of which there is a possibility for the ordinary courts of law to take cognizance.

From all the above observations, it follows, that of the courts of equity, as established in England, the following definition may be given,

¹ The master of the rolls is the keeper of these records, as the title of the office expresses. His employment in the Court of Chancery is of great importance, as he can hear and determine causes in the absence of the lord chancellor.

which is, that they are a kind of *inferior experimental* legislature, continually employed in finding out and providing law-remedies for those new species of cases, for which neither the courts of common law nor the legislature have yet found it convenient or practicable to establish any; in doing which, they are to forbear to interfere with such cases as they find already in general provided for. A judge of equity is also to adhere, in his decisions, to the system of decrees formerly passed in his own court, regular records of which are kept for that purpose.

From this latter circumstance it again follows, that a judge of equity, by the very exercise he makes of his power, is continually abridging the arbitrary part of it; as every new case he determines, every precedent he establishes, becomes a landmark, or boundary, which both he and his successors in office are afterward expected to regard.

Here it may be added as a conclusion, that appeals from the decrees passed in the courts of equity are carried to the house of peers; which circumstance alone might suggest that a judge of equity is subjected to certain positive rules, besides those '*of nature and conscience only*;' an appeal being naturally grounded on a supposition that some rules of that kind were neglected.

The above discussion on the English law has proved much longer than I intended at first; so much as to have swelled, I find, into two ad-

ditional chapters. However, I confess I have been under the greater temptation to treat at some length the subject of the courts of equity, as I have found the error (which may be called a constitutional one) concerning the arbitrary office of those courts, to be countenanced by the apparent authority of lawyers, and of men of abilities, at the same time that I have not seen, in any book, an attempt made professedly to confute the same, or indeed to point out the nature and true office of the courts of equity.

CHAP. XII.

Of criminal justice.

WE are now to treat of an article which, though it does not in England, and indeed should not in any state, make part of the powers which are properly constitutional, that is, of the reciprocal rights by means of which the powers that concur to form the government constantly balance each other, yet essentially interests the security of individuals, and, in the issue, the constitution itself : I mean to speak of criminal justice. But, previous to an exposition of the laws of England on this head, it is necessary to desire the reader's attention to certain considerations.

When a nation intrusts the power of the state to a certain number of persons, or to one, it is with a view to two points : one, to repel more

effectually foreign attacks; the other, to maintain domestic tranquillity.

To accomplish the former point, each individual surrenders a share of his property, and sometimes, to a certain degree, even of his liberty. But though the power of those who are the heads of the state may thereby be rendered very considerable, yet it cannot be said, that liberty is, after all, in any high degree endangered; because, should ever the executive power turn against the nation a strength which ought to be employed solely for its defence, this nation, if it were really free (by which I mean, unrestrained by political prejudices), would be at no loss for providing the means of its security.

In regard to the latter object, that is, the maintenance of domestic tranquillity, every individual must, exclusive of new renunciations of his natural liberty, moreover surrender (which is a matter of far more dangerous consequence) a part of his personal security.

The legislative power being, from the nature of human affairs, placed in the alternative, either of exposing individuals to dangers which it is at the same time able extremely to diminish, or of delivering up the state to the boundless calamities of violence and anarchy, finds itself compelled to reduce all its members within reach of the arm of the public power, and, by withdrawing in such cases the benefit of the social strength, to leave them exposed, bare and de-

fenceless, to the exertion of the comparatively immense power of the executors of the laws.

Nor is this all : for, instead of that powerful reaction which the public authority ought in the former case to experience, here it must find none; and the law is obliged to proscribe even the attempt of resistance. It is therefore in regulating so dangerous a power, and in guarding lest it should deviate from the real end of its institution, that legislation ought to exert all its efforts.

But here it is of great importance to observe, that the more powers a nation has reserved to itself, and the more it limits the authority of the executors of the laws, the more industriously ought its precautions to be multiplied.

In a state where, from a series of events, the will of the prince has at length attained to hold the place of law, he spreads a universal oppression, arbitrary and unresisted; even complaint is dumb : and the individual undistinguishable by him, finds a kind of safety in his own insignificance. With respect to the few who surround him, as they are at the same time the instruments of his greatness, they have nothing to dread but momentary caprices : a danger against which, if there prevails a certain general mildness of manners, they are in a great measure secured.

But in a state where the ministers of the laws meet with obstacles at every step, even their

strongest passions are continually put in motion ; and that portion of public authority , deposited with them as the instrument of national tranquillity , easily becomes a most formidable weapon .

Let us begin with the most favourable supposition , and imagine a prince whose intentions are in every case thoroughly upright ; let us even suppose that he never lends an ear to the suggestions of those whose interest it is to deceive him ; nevertheless , he will be subject to error : and this error , which , I will farther allow , solely proceeds from his attachment to the public welfare , yet may happen to prompt him to act as if his views were directly opposite .

When opportunities shall offer (and many such will occur) of procuring a public advantage by overleaping restraints , confident in the uprightness of his intentions , and being naturally not very earnest to discover the distant evil consequences of actions in which , from his very virtue , he feels a kind of complacency , he will not perceive , that , in aiming at a momentary advantage , he strikes at the laws themselves on which the safety of the nation rest ; and that those acts , so laudable when we only consider the motives of them , make a breach at which tyranny will one day enter .

Yet farther , he will not even understand the complaints that will be made against him . To insist upon them will appear to him to the last degree injurious : pride , when perhaps he is

least aware of it, will enter the lists; what he began with calmness he will prosecute with warmth; and if the laws shall not have taken every possible precaution, he may think he is acting a very honest part, while he treats as enemies of the state, men whose only crime will be that of being more sagacious than himself, or of being in a better situation for judging of the results of measures.

But it were to exalt human nature extravagantly, to think that this case of a prince, who never aims at augmenting his power, may, in any shape, be expected frequently to occur. Experience evinces, that the happiest dispositions are not proof against the allurements of power, which has no charms but as it leads on to new advances; authority endures not the very idea of restraint, nor does it cease to struggle till it has beaten down every boundary.

Openly to level every barrier, and at once to assume the absolute master, as we said before, would be a fruitless attempt. But it is here to be remembered, that those powers of the people which are reserved as a check upon the sovereign, can only be effectual so far as they are brought into action by private individuals. Sometimes a citizen, by the force and perseverance of his complaints, opens the eyes of the nation; at other times, some member of the legislature proposes a law for the removal of some public abuse: these, therefore, will be the persons

against whom the prince will direct all his efforts¹.

And he will the more assuredly do so, as, from the error so usual among men in power, he will think that the opposition he meets with, however general, wholly depends on the activity of one or two leaders; and amidst the calculations he will make, both of the supposed smallness of the obstacle which offers to his view, and of the decisive consequence of the single blow he thinks necessary to strike, he will be urged on by the despair of ambition on the point of being baffled, and by the most violent of all hatreds, that which is preceded by contempt.

In that case, which I am still considering, of a really free nation, the sovereign must be very careful that military violence do not make the smallest part of his plan : a breach of the social compact like this, added to the horror of the expedient, would infallibly endanger his whole authority. But, on the other hand, if he be resolved to succeed, he will, in defect of other resources, try the utmost extent of the legal powers which the constitution has intrusted with him; and if the laws have not in a manner provided for every possible case, he will avail himself of the imperfect precautions themselves

¹ By the word *prince*, I mean those who, under whatever appellation, and in whatever government it may be, are at the head of public affairs.

that have been taken, as a cover to his tyrannical proceedings; he will pursue steadily his particular object, while his professions breathe nothing but the general welfare, and destroy the assertors of the laws, under the very shelter of the forms contrived for their security¹.

This is not all: independently of the immediate mischief he may do, if the legislature interpose not in time, the blows will reach the constitution itself; and the consternation becoming general among the people, each individual will find himself enslaved in a state which yet may exhibit all the common appearances of liberty.

Not only, therefore, the safety of the individual, but that of the nation itself, requires the utmost precautions in the establishment of that necessary but formidable prerogative of dispensing punishments. The first to be taken, even without which it is impossible to avoid the dangers above suggested, is, that it never be left at the disposal, nor, if it be possible, exposed to the influence, of the man who is the depository of the public power.

¹ If any person should charge me with calumniating human nature (for it is her alone I am accusing here), I would desire him to cast his eyes on the history of Louis XI.—of a *Richelieu*, and, above all, on that of England before the revolution: he would see the arts and activity of government increase, in proportion as it gradually lost its means of oppression.

The next indispensable precaution is, that this power shall not be vested in the legislative body; and this precaution, so necessary alike under every mode of government, becomes doubly so when only a small part of the nation has a share in the legislative power.

If the judicial authority were lodged in the legislative part of the people, not only the great inconvenience must ensue of its thus becoming independent, but also that worst of evils, the suppression of the sole circumstance that can well identify this part of the nation with the whole, which is, a common subjection to the rules which they themselves prescribe. The legislative body, which could not, without ruin to itself, establish openly, and by direct laws, distinctions in favour of its members, would introduce them by its judgments; and the people, in electing representatives, would give themselves masters.

The judicial power ought therefore absolutely to reside in a subordinate and dependent body—dependent, not in its particular acts, with regard to which it ought to be a sanctuary, but in its rules and in its forms, which the legislative authority must prescribe. How is this body to be composed? In this respect farther precautions must be taken.

In a state where the prince is absolute master, numerous bodies of judges are most convenient, inasmuch as they restrain, in a considerable

degree, that respect of persons which is one inevitable attendant on that mode of government. Besides, those bodies, whatever their outward privileges may be, being at bottom in a state of great weakness, have no other means of acquiring the respect of the people than their integrity, and their constancy in observing certain rules and forms: nay, these circumstances, united, in some degree, overawe the sovereign himself, and discourage the thoughts he might entertain of making them the tools of his caprice¹.

¹ The above observations are in a great measure meant to allude to the French *parlemens*, and particularly that of Paris, which formed such a considerable body as to be once summoned as a fourth order to the general estates of the kingdom. The weight of that body, increased by the circumstance of the members holding their places for life, was in general attended with the advantage of placing them above being overawed by private individuals in the administration either of civil or criminal justice; it even rendered them so difficult to be managed by the court, that the ministers were at times obliged to appoint particular judges, or *commissaries*, to try such men as they resolved to ruin.

These, however, were only local advantages, connected with the nature of the French government, which was an uncontrolled monarchy, with considerable remains of aristocracy. But, in a free state, such a powerful body of men, invested with the power of

But in a strictly limited monarchy, that is, where the prince is understood to be, and in fact is, subject to the laws, numerous bodies of judicature would be repugnant to the spirit of the constitution, which requires that all powers in the state should be as much confined as the end of their institution can allow; not to add, that, in vicissitudes incident to such a state, they might exert a very dangerous influence.

Besides, that awe which is naturally inspired by such bodies, and is so useful when it is necessary to strengthen the feebleness of the laws, would not only be superfluous in a state where the whole power of the nation is on their side, but would moreover have the mischievous tendency to introduce another sort of fear than that which men must be taught to entertain. Those mighty tribunals, I am willing to suppose, would preserve, in all situations of affairs, that integrity which distinguishes them in states of a different constitution: they would never inquire after the influence, still less the political sentiments, of those whose fate they were called to decide; but these advantages, not being founded

deciding on the life, honour, and property of the citizens, would be productive of very dangerous political consequences; and the more so, if such judges had, as is the case all over the world, except here, the power of deciding upon the matter of law and the matter of fact.

in the necessity of things, and the power of such judges seeming to exempt them from being so very virtuous, men would be in danger of taking out the fatal opinion, that the simple exact observance of the laws is not the only task of prudence; the citizen called upon to defend, in the sphere where fortune has placed him, his own rights, and those of the nation itself, would dread the consequence of even a lawful conduct, and though encouraged by the law, might desert himself when he came to behold its ministers.

In the assembly of those who sit as his judges, the citizen might possibly descry no enemies; but neither would he see any man whom a similarity of circumstances might engage to take a concern in his fate: and their rank, especially when joined with their numbers, would appear to him to lift them above that which overawes injustice where the law has been unable to secure any other check—I mean the reproaches of the public.

And these his fears would be considerably heightened, if, by the admission of the jurisprudence received among certain nations, he beheld those tribunals, already so formidable, wrap themselves up in mystery, and be made, as it were, inaccessible.¹

¹An allusion is made here to the secrecy with which the proceedings, in the administration of criminal

He could not think, without dismay, of those vast prisons within which he is one day perhaps justice, are to be carried on, according to the rules of the civil law, which in that respect are adopted over all Europe. As soon as the prisoner is committed, he is debarred of the sight of every body, till he has gone through his several examinations. One or two judges are appointed to examine him, with a clerk, to take his answers in writing, and he stands alone before them in some private room in the prison. The witnesses are to be examined apart, and he is not admitted to see them till their evidence is closed: they are then *confronted* together, before all the judges, to the end that the witnesses may see if the prisoner is really the man they meant in giving their respective evidences, and that the prisoner may object to such of them as he shall think proper. This done, the depositions of those witnesses, who are adjudged upon trial to be exceptionable, are set aside; the depositions of the others are to be laid before the judges, as well as the answers of the prisoner, who has been previously called upon to confirm or deny them in their presence; and a copy of the whole is delivered to him, that he may, with the assistance of a counsel, which is now granted him, prepare for his justification. The judges are, as has been said before, to decide both upon the matter of law and the matter of fact, as well as upon all incidents that may arise during the course of the proceedings, such as admitting witnesses to be heard in behalf of the prisoner, etc.

This mode of criminal judicature may be useful as to the bare discovery of truth – a point which I do

to be immured—of those proceedings, unknown to him, through which he is to pass—of that total seclusion from the society of other men—or of those long and secret examinations, in which, abandoned wholly to himself, he will have nothing but a passive defence to oppose to the artfully-varied questions of men whose intentions he shall at least mistrust; and in which his spirits, broken down by solitude, shall receive no support, either from the counsels of his friends, or the looks of those who may offer up vows for his deliverance.

The security of the individual, and the consciousness of that security, being then equally essential to the enjoyment of liberty, and necessary for the preservation of it, these two points must never be left out of sight, in the establishment of a judicial power; and I conceive that they necessarily lead to the following maxims.

In the first place, I shall remind the reader of what has been laid down above, that the not propose to discuss here; but, at the same time, a prisoner is so completely delivered up into the hands of the judges, who even can detain him almost at pleasure by multiplying or delaying his examinations, that, whenever it is adopted, men are almost as much afraid of being accused, as of being guilty, and especially grow very cautious how they interfere in public matters. We shall see presently how the trial by jury, peculiar to the English nation, is admirably adapted to the nature of a free state.

judicial authority ought never to reside in an independent body; still less in him who is already the trustee of the executive power.

Secondly, the party accused ought to be provided with all possible means of defence. Above all things, the whole proceedings ought to be public. The courts, and their different forms, must be such as to inspire respect, but never terror: and the cases ought to be so accurately ascertained, the limits so clearly marked, that neither the executive power, nor the judges, may ever hope to transgress them with impunity.

In fine, since we must absolutely pay a price for the advantage of living in society, not only by relinquishing some share of our natural liberty (a surrender which, in a wisely-formed government, a wise man will make without reluctance), but even also by resigning part of our personal security—in a word, since all judicial power is an evil, though a necessary one, no care should be omitted to reduce as far as possible the dangers of it.

As there is, however, a period at which the prudence of man must stop, at which the safety of the individual must be given up, and the law is to resign him to the judgment of a few persons, that is (to speak plainly), to a decision in some sense arbitrary, it is necessary that the law should narrow as far as possible this sphere of peril, and so order matters, that when the subject shall happen to be summoned to the

decision of his fate by the fallible conscience of a few of his fellow-creatures, he may always find in them advocates, and never adversaries.

CHAP. XIII.

The subject continued.

AFTER having offered to the reader, in the preceding chapter, such general considerations as I thought necessary, in order to convey a more just idea of the spirit of the criminal judicature in England, and of the advantages peculiar to it, I now proceed to exhibit the particulars :

When a person is charged with a crime, the magistrate who is called in England *a justice of the peace*, issues a warrant to apprehend him ; but this warrant can be no more than an order for bringing the party before him : he must then hear him, and take down in writing his answers, together with the different informations. If it appears, on this examination, either that the crime laid to the charge of the person who is brought before the justice was not committed, or that there is no just ground to suspect him of it, he must be set absolutely at liberty ; if the contrary results from the examination, the party accused must give bail for his appearance to answer to the charge, unless in capital cases ; for then he must, for safer custody, be

really committed to prison, in order to take his trial at the next sessions.

But this precaution, of requiring the examination of an accused person, previous to his imprisonment, is not the only care which the law has taken in his behalf; it has farther ordained, that the accusation against him should be again discussed, before he can be exposed to the danger of a trial. At every session the sheriff appoints what is called the *grand jury*. This assembly must be composed of more than twelve men, and less than twenty-four; and is always formed out of the most considerable persons in the county. Its function is, to examine the evidence that has been given in support of every charge: if twelve of those persons do not concur in the opinion that an accusation is well grounded, the party is immediately discharged; if, on the contrary, twelve of the grand jury find the proofs sufficient, the prisoner is said to be indicted, and is detained, in order to go through the remaining process.

On the day appointed for his trial, the prisoner is brought to the bar of the court, where the judge, after causing the bill of indictment to be read in his presence, must ask him how he would be tried? to which the prisoner answers, *By God and my country*; by which he is understood to claim to be tried by a jury, and to have all the judicial means of defence to which the law entitles him. The sheriff then

appoints what is called the *petit jury* ; this must be composed of twelve men , chosen out of the county where the crime was committed , and possessed of a landed income of ten pounds a year : their declaration finally decides on the truth or falsehood of the accusation.

As the fate of the prisoner thus entirely depends on the men who compose this jury , justice requires that he should have a share in the choice of them ; and this he has , through the extensive right which the law has granted him , of challenging , or objecting to such of them as he may think exceptionable.

These challenges are of two kinds. One, which is called the challenge to the *array*, has for its object to have the whole pannel set aside : it is proposed by the prisoner, when he thinks that the sheriff who formed the pannel is not indifferent in the cause ; for instance , if he thinks he has an interest in the prosecution , that he is related to the prosecutor, or in general to the party who pretends to be injured.

The other challenges are called , to the polls (*in capita*) : they are exceptions proposed against the jurors , severally, and are reduced to four heads by sir Edward Coke.—That which he calls *propter honoris respectum* , may be proposed against a lord empannelled on a jury ; or he might challenge himself. That *propter defectum* takes place when a juror is legally incapable of serving that office , as if he is an

alien; if he has not an estate sufficient to qualify him, etc. That *propter delictum* has for its object to set aside any juror convicted of such crime or misdemeanor as renders him infamous, as felony, perjury, etc. That *propter affectum* is proposed against a juror who has an interest in the conviction of the prisoner: one, for instance, who has an action depending between him and the prisoner; one who is of kin to the prosecutor, or his counsel, attorney, or of the same society or corporation with him, etc.¹

In fine, in order to relieve even the imagination of the prisoner, the law allows him, independently of the several challenges above mentioned, to challenge peremptorily, that is to say, without shewing any cause, twenty jurors successively.²

When at length the jury is formed, and they have taken their oath, the indictment is opened, and the prosecutor produces the proofs of his accusation. But, unlike to the rules of the civil law, the witnesses deliver their evidence in

¹ When a prisoner is an alien, one half of the jurors must also be aliens: a jury thus formed is called a jury *de medietate linguæ*.

² When these several challenges reduce too much the number of the jurors on the pannel, which is forty-eight, new ones are named on a writ of the judge, who are named the *tales*, from those words of the writ, *decem* or *octo tales*.

the presence of the prisoner : the latter may put questions to them ; he may also produce witnesses in his behalf, and have them examined upon oath. Lastly, he is allowed to have a counsel to assist him, not only in the discussion of any point of law which may be complicated with the fact, but also in the investigation of the fact itself, and who points out to him the questions he ought to ask, or even asks them for him.¹

Such are the precautions which the law has devised for cases of common prosecutions ; but in those for high-treason, and for misprision of treason, that is to say, for a conspiracy against the life of the king, or against the state, and for a concealment of it²—accusations which suppose a heat of party and powerful accusers—the law has provided for the accused party farther safeguards.

First, no person can be questioned for any treason, except a direct attempt on the life of the king, after three years elapsed since the offence. 2.^o The accused party may, independently of his other legal grounds of challenging, *peremptorily* challenge thirty-five jurors. 3.^o He may have two counsels to assist him through the

¹ This last article, however, is not established by law, except in cases of treason; it is done only through custom and the indulgence of the judges.

² The penalty of a misprision of treason, is the forfeiture of all goods, and imprisonment for life.

whole course of the proceedings. 4.^o That his witnesses may not be kept away, the judges must grant him the same compulsive process to bring them in, which they issue to compel the evidences against him. 5.^o A copy of his indictment must be delivered to him ten days at least before the trial, in presence of two witnesses, and at the expense of five shillings; which copy must contain all the facts laid to his charge, the names, professions, and abodes, of the jurors who are to be on the pannel, and of all the witnesses who are intended to be produced against him.¹

When, either in cases of high-treason, or of inferior crimes, the prosecutor and the prisoner have closed their evidence, and the witnesses have answered to the respective questions both of the bench and of the jurors, one of the judges makes a speech, in which he sums up the facts which have been advanced on both sides. He points out to the jury what more precisely constitutes the hinge of the question before them; and he gives them his opinion both with regard to the evidences that have been given, and to the point of law which is to guide them in their decision. This done, the jury withdraw into an adjoining room, where they must remain without

¹ Stat. 7 Will. III. c. 3. and 7 Anne, c. 21. The latter was to be in force only after the death of the late Pretender.

eating and drinking, and without fire, till they have agreed unanimously among themselves, unless the court give a permission to the contrary. Their declaration, or verdict (*verdictum*), must (unless they choose to give a special verdict) pronounce expressly, either that the prisoner is guilty, or that he is not guilty, of the fact laid to his charge. Lastly, the fundamental maxim of this mode of proceeding is, that the jury must be unanimous.

And as the main object of the institution of the trial by jury is to guard accused persons against all decisions whatsoever from men invested with any permanent official authority¹, it is not only a settled principle, that the opinion which the judge delivers has no weight but such as the jury choose to give it; but their verdict must, besides, comprehend the whole matter in trial, and decide as well upon the fact as upon the point of law that may arise out of it: in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law².

¹ 'Laws (as *Junius* says extremely well) are intended, not to trust to what men will do, but to guard against what they may do.'

² Unless they choose to give a *special* verdict.— 'When the jury (says Coke) doubt of the law, and intend to do that which is just, they find the *special* matter; and the entry is, *Et super totâ materiâ petunt discretionem justiciariorum*.' Inst. iv. These

This is even so essential a point, that a bill of indictment must expressly be grounded upon those two objects. Thus an indictment for treason must charge, that the alleged facts were committed with a treasonable intent (*proditorie*). An indictment for murder must express, that the fact has been committed with *malice prepense*, or afore-thought. An indictment for robbery must charge, that the things were taken with an intention to rob (*animo furandi*), etc. ¹

Juries are even so uncontrollable in their verdict (so apprehensive has the constitution been lest precautions to restrain them in the exercise

words of Coke, we may observe, confirm beyond a doubt the power of the jury to determine on the whole matter in trial—a power which in all constitutional views is necessary; and the more so, since a prisoner cannot in England challenge the judge, as he can under the civil law, and for the same causes as he can a witness.

¹ The principle that a jury is to decide both on the fact and the *criminality* of it, is so well understood, that, if a verdict were so framed as only to have for its object the bare existence of the fact laid to the charge of the prisoner, no punishment could be awarded by the judge in consequence of it. Thus, in the prosecution of Woodfall, for printing Junius's Letter to the King (a supposed libel), the jury brought in the following verdict, *guilty of printing and publishing only*: the consequence of which was the discharge of the prisoner.

of their functions, however specious in the beginning, might, in the issue, be converted to the very destruction of the ends of that institution), that it is a repeated principle, that a juror, in delivering his opinion, is to have no other rule than his opinion itself : that is to say, no other rule than the belief which results to his mind from the facts alleged on both sides, from their probability, from the credibility of the witnesses, and even from all such circumstances as he may have a private knowledge of. Lord chief justice Hale expresses himself on this subject, in the following terms :

‘ In this recess of the jury, they are to consider the evidence, to weigh the credibility of the witnesses, and the force and efficacy of their testimonies ; wherein (as I have before said) they are not precisely bound by the rules of the civil law, *viz.* to have two witnesses to prove every fact, unless it be in cases of treason, nor to reject one witness because he is single, or always to believe two witnesses, if the probability of the fact does, upon other circumstances, reasonably encounter them ; for the trial is not here simply by witnesses, but *by jury* : nay, it may so fall out, that a jury, upon their own knowledge, may know a thing to be false, that a witness swore to be true, or may know a witness to be incompetent or incredible, though nothing be objected against him—and may give their verdict accordingly.’

If the verdict pronounces *not guilty*, the prisoner is set at liberty, and cannot, on any pretence, be tried again for the same offence. If the verdict declares him *guilty*, then, and not till then, the judge enters upon his function as a judge, and pronounces the punishment which the law appoints¹. But, even in this case, he is not to judge according to his own discretion only; he must strictly adhere to the letter of the law; and no constructive extension can be admitted; and, however criminal a fact might in itself be, it would pass unpunished if it were found not to be positively comprehended in some one of the cases provided for by the law.

¹ When the party accused is one of the lords temporal, he likewise enjoys the universal privilege of being judged by his peers, though the trial then differs in several respects. In the first place, as to the number of the jurors: all the peers are to perform the function of such, and they must be summoned at least twenty days before-hand. 2.^o When the trial takes place during the session, it is said to be in the *high court of parliament*; and the peers officiate at once as jurors and judges: when the parliament is not sitting, the trial is said to be in the court of the *high steward of England*—an office which is not usually in being, but is revived on those occasions; and the high steward performs the office of judge. 3.^o In either of these cases, unanimity is not required: and the majority, which must consist of twelve persons at least, is to decide.

The evil that may arise from the impunity of a crime,—that is, an evil, which a new law may instantly stop—has not by the English laws been considered as of magnitude sufficient to be put in comparison with the danger of breaking through a barrier on which so materially depends the safety of the individual¹.

To all these precautions taken by the law for the safety of the subject, one circumstance must be added, which indeed would alone justify the partiality of the English lawyers to their laws in preference to the civil law;—I mean the absolute rejection they have made of torture². Without repeating here what has been said on

¹ I shall here give an instance of the scruple with which the English judges proceed upon occasions of this kind. Sir Henry Ferrers having been arrested by virtue of a warrant, in which he was termed a *knight*, though he was a baronet, Nightingale, his servant, took his part, and killed the officer; but it was decided, that, as the warrant was an ill warrant, the killing of an officer in executing that warrant could not be murder, because no good warrant: wherefore he was found not guilty of the murder and manslaughter.' See Croke's Rep. P. III. p. 371.

² Coke says (Inst. III. p. 35), that when John Holland, duke of Exeter, and William de la Pole, duke of Suffolk, renewed, under Henry VI., the attempts made to introduce the civil law, they exhibited the torture as a *beginning thereof*. The instrument was called the duke of Exeter's daughter.

the subject by the admirable author of the treatise on 'Crimes and Punishments', I shall only observe, that the torture, in itself so horrible an expedient, would, more especially in a free state, be attended with the most fatal consequences. It was absolutely necessary to preclude, by rejecting it, all attempts to make the pursuit of guilt an instrument of vengeance against the innocent. Even the convicted criminal must be spared, and a practice at all rates exploded, which might so easily be made an instrument of endless vexation and persecution¹.

For the farther prevention of abuses, it is an invariable usage that the trial be public. The prisoner neither makes his appearance, nor pleads, but in places where every body may have free entrance; and the witnesses when they give their evidence, the judge when he delivers

¹ Judge Foster relates from Whitelocke, that the bishop of London having said to Felton, who had assassinated the duke of Buckingham, 'If you will not confess, you *must go to the rack*:' the man replied, 'If it must be so, I know not whom I may accuse in the extremity of the torture; bishop Laud, perhaps, or any lord at this board.'

'Sound sense (adds Foster) in the mouth of an enthusiast and a ruffian.'

Laud having proposed the rack, the matter was shortly debated at the board, and it ended in a reference to the judges, who unanimously resolved that the rack could not be legally used.

his opinion, the jury when they give their verdict, are all under the public eye. Lastly, the judge cannot change either the place or kind of punishment ordered by the law; and a sheriff who should take away the life of a man in a manner different from that which the law prescribes, would be prosecuted as guilty of murder¹.

In a word, the constitution of England, being a free constitution, demanded, from that circumstance alone (as I should already have but too often repeated, if so fundamental a truth could be too often urged), extraordinary precautions to guard against the dangers which unavoidably attend the power of inflicting punishments; and it is particularly when considered in this light, that the trial by jury proves an admirable institution.

By means of it, the judicial authority is not only placed out of the hands of the man who is invested with the executive authority—it is even out of the hands of the judge himself. Not only the person who is trusted with the public power cannot exert it, till he has, as it were, received a permission to that purpose, of those who are set apart to administer the laws; but these latter are also restrained in a manner exactly alike,

¹ And if any other person but the sheriff, even the judge himself, were to cause death to be inflicted upon a man, though convicted, it would be deemed homicide. See Blackstone, book iv. chap. 14.

and cannot make the law speak, but when, in their turn, they have likewise received permission.

And those persons to whom the law has thus exclusively delegated the prerogative of deciding that a punishment is to be inflicted—those men, without whose declaration the executive and the judicial powers are both thus bound down to inaction, do not form among themselves a permanent body, who may have had time to study how their power can serve to promote their private views or interest: they are men selected at once from among the people, who perhaps never were before called to the exercise of such a function, nor foresee that they ever shall be called to it again.

As the extensive right of challenging effectually baffles, on one hand, the secret practices of such as, in the face of so many discouragements, might still endeavour to make the judicial power subservient to their own views, and, on the other, excludes all personal resentments, the sole affection which remains to influence the integrity of those who alone are entitled to put the public power into action, during the short period of their authority, is, that their own fate as subjects is essentially connected with that of the man whose doom they are going to decide.

In fine, such is the happy nature of this institution, that the judicial power, a power so formidable in itself, which is to dispose, without

finding any resistance, of the property, honour, and life, of individuals, and which, whatever precautions may be taken to restrain it, must in a great degree remain arbitrary, may be said in England to exist—to accomplish every intended purpose—and to be in the hands of nobody¹.

In all these observations on the advantages of the English criminal law, I have only considered it as connected with the constitution, which is a free one; and it is in this view alone that I have compared it with the jurisprudence received in other states. Yet, abstractedly from the weighty constitutional considerations which I have suggested, I think there are still other interesting grounds of pre-eminence on the side of the laws of England.

In the first place, they do not permit that a man should be made to run the risk of a trial, but upon the declaration of twelve persons at least (*the grand jury*). Whether he be in prison, or on his trial, they never for an instant refuse free access to those who have either advice or comfort to give him; they even allow him to summon all who may have any thing to say in

¹ The consequence of this institution is, that no man in England ever meets the man of whom he may say, 'That man has a power to decide on my death or life.' If we could for a moment forget the advantages of that institution, we ought at least to admire the ingenuity of it.

his favour : and , lastly , what is of very great importance , the witnesses against him must deliver their testimony in his presence : he may cross-examine them , and , by one unexpected question , confound a whole system of calumny : indulgences these , all denied by the laws of other countries .

Hence , though an accused person may be exposed to have his fate decided by persons (*the petty jury*) who possess not , perhaps , all that sagacity which in some delicate cases it is particularly advantageous to meet with in a judge , yet this inconvenience is amply compensated by the extensive means of defence with which the law , as we have seen , has provided him . If a juryman does not possess that expertness which is the result of long practice , yet neither does he bring to judgment that hardness of heart which is , more or less , also the consequence of it : and bearing about him the principles (let me say , the unimpaired instinct) of humanity , he trembles while he exercises the awful office to which he finds himself called , and in doubtful cases always decides for mercy .

It is to be farther observed , that , in the usual course of things , juries pay great regard to the opinions delivered by the judges ; that , in those cases where they are clear as to the fact , yet find themselves perplexed with regard to the degree of guilt connected with it , they leave it , as has been said before , to be ascertained by the dis-

cretion of the judge, by returning what is called a *special verdict*; that, whenever circumstances seem to alleviate the guilt of a person, against whom nevertheless the proof has been positive, they temper their verdict by recommending him to the mercy of the king (which seldom fails to produce at least a mitigation of the punishment); that, though a man once acquitted can never, under any pretence whatsoever, be again brought into peril for the same offence, yet a new trial would be granted if he had been found guilty upon evidence strongly suspected of being false. Lastly, what distinguishes the laws of England from those of other countries in a very honourable manner, is, that, as the torture is unknown to them, so neither do they know any more grievous punishment than the simple deprivation of life.

All these circumstances have combined to introduce such a mildness into the exercise of criminal justice, that the trial by jury is that point of their liberty to which the people of England are most thoroughly and universally wedded; and the only complaint I have ever heard uttered against it, has been by men who, more sensible of the necessity of public order than alive to the feelings of humanity, think that too many offenders escape with impunity.

CHAP. XIV.

The subject concluded. Laws relative to imprisonment.

BUT what completes that sense of independence which the laws of England procure to every individual (a sense which is the noblest advantage attending liberty) is, the greatness of their precautions upon the delicate point of imprisonment.

In the first place, by allowing, in most cases, enlargement upon bail, and by prescribing, on that article, express rules for the judges to follow, they have removed all pretexts, which circumstances might afford, for depriving a man of his liberty.

But it is against the executive power that the legislature has, above all, directed its efforts: nor has it been but by slow degrees that it has been successful in wresting from it a branch of power which enabled it to deprive the people of their leaders, as well as to intimidate those who might be tempted to assume the function; and which, having thus all the efficacy of more odious means without the dangers of them, was perhaps the most formidable weapon with which it might attack public liberty.

The methods originally pointed out by the laws of England for the enlargement of a person

unjustly imprisoned, were the writs of *mainprise*, *de odio et atia*, and *de homine replegiando*. Those writs, which could not be denied, were an order to the sheriff of the county in which a person was confined, to inquire into the causes of his confinement; and, according to the circumstances of his case, either to discharge him completely, or upon bail.

But the most useful method, and which even by being most general and certain, has tacitly abolished all the others, is the writ of *Habeas corpus*, so called, because it begins with the words, *Habeas corpus ad subjiciendum*. This writ being a writ of high prerogative, must issue from the Court of King's Bench : its effects extend equally to every county; and the king by it requires, or is understood to require, the person who holds one of his subjects in custody, to carry him before the judge, with the date of the confinement, and the cause of it, in order to discharge him, or continue to detain him according as the judge shall decree.

But this writ, which might be a resource in cases of violent imprisonment effected by individuals, or granted at their request, was but a feeble one, or rather was no resource at all against the prerogative of the prince, especially under the sway of the Tudors, and in the beginning of that of the Stuarts. And even in the first years of Charles the first, the judges of the King's Bench, who, in consequence of the spirit

of the times, and of their holding their places *durante bene placito*, were constantly devoted to the court, declared, ‘that they could not, upon a *Habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy-council.’

Those principles, and the mode of procedure which resulted from them, drew the attention of parliament; and in the bill called the Petition of Right, passed in the third year of the reign of Charles the First, it was enacted, that no person should be kept in custody, in consequence of such imprisonments.

But the judges knew how to evade the intention of this act; they indeed did not refuse to discharge a man imprisoned without a cause; but they used so much delay in the examination of the causes, that they obtained the full effect of an open denial of justice.

The legislature again interposed, and in the act passed in the sixteenth year of the reign of Charles the First, the same in which the Star-chamber was suppressed, it was enacted, that ‘if any person be committed by the king himself in person or by his privy-council, or by any of the members thereof, he shall have granted unto him, without delay, upon any pretence whatsoever, a writ of *Habeas corpus*; and that the judge shall thereupon, within three court

days after the return is made, examine and determine the legality of such imprisonment.

The act seemed to preclude every possibility of future evasion : yet it was evaded still ; and, by the connivance of the judges, the person who detained the prisoner could, without danger, wait for a second, and a third writ, called an *alias* and a *pluries*, before he produced him.

All these different artifices gave at length birth to the famous act of *Habeas corpus* (passed in the thirty-first year of the reign of Charles the Second), which is considered in England as a second Great Charter, and has extinguished all the resources of oppression¹.

The principal articles of this act are, 1. To fix the different terms allowed for bringing a prisoner : those terms are proportioned to the distance, and none can in any case exceed twenty days.

2. That the officer and keeper neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority (specified in the act), shall, for the first

¹ The real title of this act is, ' An Act for better securing the liberty of the subject, and for prevention of imprisonment beyond the seas.'

offence, forfeit one hundred pounds, and for the second two hundred, to the party aggrieved, and be disabled to hold his office.

3. No person, once delivered by *Habeas corpus*, shall be recommitted for the same offence, on penalty of five hundred pounds.

4. Every person committed for treason or felony, shall, if he require it, in the first week of the next term, or the first day of the next session, be indicted in that term, or session, or else admitted to bail, unless it should be proved upon oath, that the king's witness cannot be produced at that time: and if not indicted and tried in the second term, or session, he shall be discharged of his imprisonment for such imputed offense.

5. Any of the twelve judges, or the lord chancellor, who shall deny a writ of *Habeas corpus*, on sight of the warrant, or on oath that the same is refused, shall forfeit severally to the party aggrieved five hundred pounds.

6. No inhabitant of England (except persons contracting, or convicts praying to be transported), shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any place beyond the seas, within or without the king's dominions—on pain, that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than five hundred pounds, to be recovered with treble costs—shall be disabled to bear any office of trust or profit—

shall incur the penalties of a *præmunire*¹, and be incapable of the king's pardon.

¹ The statutes of *præmunire*, thus called from the writ for their execution, which begins with the words *præmunire* (for *præmonere*) *facias*, were originally designed to oppose the usurpations of the popes. The first was passed under the reign of Edward the First, and was followed by several others, which, even before the reformation, established such effectual provisions as to draw upon one of them the epithet of *execrabile statutum*. The offences against which those statutes were framed were likewise distinguished by the appellation of *præmunire*; and under that word were included all attempts to increase the power of the pope at the expense of the royal authority. The punishment decreed for such cases was also called a *præmunire*; it has since been extended to several other kinds of offence, and amounts to imprisonment at the king's pleasure, or for life, and forfeiture of all goods and rents of lands.

END OF VOLUME I.

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